

(16,792.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 240.

THE DE LA VERGNE REFRIGERATING MACHINE
COMPANY, PETITIONER,*vs.*

THE GERMAN SAVINGS INSTITUTION ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE EIGHTH CIRCUIT.

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a Pleas and proceedings in the United States circuit court of appeals for the eighth circuit, at the December term, 1897, of said court, begun and held at the United States court-house, in the city of St. Louis, Missouri, on the first Monday in December, to wit, the sixth day of December, A. D. 1897, before the Honorable Walter H. Sanborn and Honorable Amos M. Thayer, circuit judges.

Attest :

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,

Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

Be it remembered that heretofore, to wit, on the third day of July, A. D. 1897, a transcript of record, pursuant to a writ of error directed to the circuit court of the United States for the eastern district of Missouri, was filed in the office of the clerk of the United States circuit court of appeals for the eighth circuit, in the case of The De La Vergne Refrigerating Machine Company, plaintiff in error, *vs.* The German Savings Institution *et al.*; which said transcript of record, as printed by stipulation of the parties for use on the hearing of said cause, is in the words and figures following, to wit :

1 In the Circuit Court of Appeals of the United States, Eighth Circuit, May Term, 1897.

DE LA VERGNE REFRIGERATING MACHINE COMPANY, Plaintiff in	}	3695.
Error,		
<i>vs.</i>		
GERMAN SAVINGS INSTITUTION ET AL., Defendants in Error.		

It is hereby stipulated and agreed by and between the parties hereto that this cause is a consolidated cause made up of eight several cases in the court below as follows :

LEO RASSIEUR	}	3695.
<i>vs.</i>		
DE LA VERGNE REFRIGERATING MACHINE COMPANY ET AL.		
FREDERICK WIDMAN	}	3696.
<i>vs.</i>		
SAME DEFENDANTS.		
GERMAN SAVINGS INSTITUTION	}	3697.
<i>vs.</i>		
SAME DEFENDANTS.		
EDWARD MALLINCKRODT	}	3698.
<i>vs.</i>		
SAME DEFENDANTS.		
LEO RASSIEUR, Trustee,	}	3699.
<i>vs.</i>		
SAME DEFENDANTS.		

ANNA JUNGENFELD

vs.

SAME DEFENDANTS.

} 3700.

JACOB W. SKINKLE, to Use of MERCHANTS' NAT. BK. OF
CHICAGO,

vs.

SAME DEFENDANTS.

} 3726.

EDWARD JUNGENFELD'S ADM'R

vs.

SAME DEFENDANTS.

} 3701.

That the pleadings in these several cases are substantially alike with the exception of the names of parties plaintiff and the amounts for which judgment is prayed in each case.

2 That case No. 3695 was begun on the 2nd day of July, 1892, and the amount for which judgment is demanded is \$20,000.00.

That case No. 3696 was begun on the 2nd day of July, 1892, and the amount for which judgment is demanded is \$7,000.00.

That case No. 3697 was begun on the 2nd day of July, 1892, and the amount for which judgment is demanded is \$2,500.00.

That case No. 3698 was begun on the 2nd day of July, 1892, and the amount for which judgment is demanded is \$22,500.00.

That case No. 3699 was begun on the 2nd day of July, 1892, and the amount for which judgment is demanded is \$7,000.00.

That case No. 3700 was begun on the 2nd day of July, 1892, and the amount for which judgment is demanded is \$7,000.00.

That case No. 3701 was begun on the 2nd day of July, 1892, and the amount for which judgment is demanded is \$9,000.00.

That case No. 3726 was begun on the 18th day of March, 1893, and the amount for which judgment is demanded is \$25,000.00.

It is further stipulated that in printing the record in this consolidated cause, the clerk shall omit the pleadings except in the case in which the German Savings Institution was plaintiff in the court below, and in lieu of printing the pleadings in the other cases making up this consolidated case, shall print this stipulation.

ALDRICH, REID, FOSTER & ALLEN AND
BOYLE, PRIEST & LEHMANN,

Attorneys for Plaintiff in Error.

RASSIEUR & SCHNURMACHER,

Attorneys for Defendants in Error.

No. 974. The De La Vergne Refrigerating Machine Co., plaintiff in error, vs. German Savings Institution *et al.* Stipulation as to printing. Filed Aug. 4, 1897. John D. Jordan, clerk.

UNITED STATES OF AMERICA, ss.:

The President of the United States to the honorable the judges of the circuit court of the United States for the eastern division of the eastern judicial district of Missouri, Greeting :

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, at the March term, 1897, thereof, between German Savings Institution *vs.* De La Vergne Refrigerating Machine Co., and Wm. C. Richardson, public administrator of the city of St. Louis, Mo., and as such in charge of the estate of John C. De La Vergne, deceased ;

3 Leo Rassieur *vs.* Same Defendants ; Jacob W. Skinkle, to the use of Merchants' National Bank of Chicago *vs.* Same Defendants ; Edward Mallinckrodt *vs.* Same Defendants ; Anna Jungensfeld *vs.* Same Defendants ; Leo S. Rassieur, adm'r *d. b. n. c. t. a.* of the estate of Edmund Jungensfeld, deceased, *vs.* Same Defendants ; Leo Rassieur, sole surviving trustee of Carl Jungensfeld *vs.* Same Defendants, and Fred Widman *vs.* Same Defendants, making up one consolidated cause, a manifest error hath happened to the great damage of the said De La Vergne Refrigerating Machine Company, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals, for the eighth circuit, together with this writ, so that you have the said record and proceedings aforesaid at the city of St. Louis, Missouri, and filed in the office of the clerk of the United States circuit court of appeals, for the eighth circuit, on or before the fifth day of July, 1897, to the end that the record and proceedings aforesaid being inspected, the United States circuit court of appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 6th day of May, in the year of our Lord one thousand eight hundred and ninety-seven. Issued, at Seal of the United States
Circuit Court, Eastern
Division of the Eastern
Judicial District, Mis-
souri. office in the city of St. Louis, with the seal of the circuit court of the United States, for the eastern division of the eastern judicial district of Missouri, dated as aforesaid.

T. L. CRAWFORD,

*Clerk Circuit Court United States, Eastern Division
of the Eastern Judicial District of Missouri.*

Allowed by—

ELMER B. ADAMS, *Judge.*

Return to Writ.

UNITED STATES OF AMERICA,
Eastern Division of the Eastern Judicial } ss :
District of Missouri,

In obedience to the command of the within writ, I herewith transmit to the United States circuit court of appeals for the eighth circuit, a duly certified transcript of the record and proceedings in the within-entitled case, with all things concerning the same.

Seal of the United States
 Circuit Court, Eastern
 Division of the Eastern
 Judicial District, Mis-
 souri.

In witness whereof I hereto subscribe my name, and affix the seal of said circuit court, at office in the city of St. Louis, this 3rd day of July, A. D. 1897.

T. L. CRAWFORD,
Clerk of said Court.

Nos. 3695, 3696, 3697, 3698, 3699, 3700, 3701, 3726—consolidated. United States circuit court, eastern division of the eastern judicial district of Missouri. *Leo Rassieur vs. De La Vergne Refrigerating Machine Co. et al.* Writ of error. To the circuit court of the United States for the eastern division of the eastern judicial district of Missouri. Filed May 10, 1897, as of May 6th, 1897. T. L. Crawford, clerk.

The United States of America to German Savings Institution, Leo Rassieur, Jacob W. Skinkle, to the use of Merchants' National Bank of Chicago; Edward Mallinckrodt, Anna Jungensfeld, Leo S. Rassieur, adm'r *d. b. n. c. t. a.* of the estate of Edmund Jungensfeld, deceased; Leo Rassieur, sole surviving trustee of Carl Jungensfeld, and Fred Widman, Greeting:

You are hereby cited and admonished to be and appear in the circuit court of appeals of the United States, at the city of St. Louis, sixty days from and after the day this citation bears date, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern division of the eastern judicial district of Missouri, wherein The De La Vergne Refrigerating Machine Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Honorable Elmer B. Adams, judge of the district court of the United States for the eastern district of Missouri, this sixth day of May, in the year of our Lord one thousand eight hundred and ninety-seven.

ELMER B. ADAMS,
*United States District Judge for the
 Eastern District of Missouri.*

UNITED STATES OF AMERICA,
Eastern Division of the Eastern Judicial } ss :
District of Missouri,

5 I certify that on the 11th day of May, 1897, at the city of
St. Louis, in the above-named district I executed this writ by
reading the same to Leo Rassieur, attorney of record for the
within-named defendants in error.

J. E. LYNCH,
U. S. Marshal Eastern Dist. of Mo.,
By W. W. NALL, Deputy.

1 service \$2.00.

Nos. 3695, 3696, 3697, 3698, 3699, 3700, 3701, 3726, consoli-
dated. United States circuit court, eastern division of the eastern
judicial district of Missouri. Leo Rassieur vs. De La Vergne Re-
frigerating Machine Co. et al. Citation. Filed May 10, 1897, as
of May 6, '97. T. L. Crawford, clerk.

* * * * *

UNITED STATES OF AMERICA,
Eastern Division of the Eastern Judicial } ss :
District of Missouri,

In the Circuit Court of the United States in and for the Eastern
Division of said District.

Be it remembered, that on the 2nd day of December, A. D. 1892,
there was filed in the clerk's office of said court, a certain tran-
script from the circuit court, city of St. Louis, in the words and
figures as follows, to wit:

(Transcript.)

STATE OF MISSOURI, }
City of St. Louis, } ss :

Be it remembered, that on the second day of July, A. D. 1892,
there was filed in the office of the clerk of the circuit court, city
of St. Louis, a petition and affidavit in a certain cause, wherein
"The German Savings Institution" is plaintiff and The De La
Vergne Refrigerating Machine Company et al. are defendants.

The said petition and affidavit are respectively, in words and
figures as follows, to wit:

(Petition.)

STATE OF MISSOURI, }
 City of St. Louis, } ss.:

In the Circuit Court of the City of St. Louis, October Term, 1892.

THE GERMAN SAVINGS INSTITUTION, a Corporation, Plaintiff, }
 vs. }
 THE DE LA VERGNE REFRIGERATING MACHINE COMPANY and }
 John C. De La Vergne, Defendants. }

Plaintiff states that defendant The De La Vergne Refrigerating Machine Company is, and at all the times herein stated
 6 was, a body politic, duly organized and created under the laws of the State of New York, having its chief office and place of business out of this State, and in the State of New York, and that defendant John C. De La Vergne is a non-resident of this State, residing as plaintiff is advised and believes in the city of New York in said State.

Plaintiff states that heretofore, to wit, on or about the fourteenth day of October, 1890, the Consolidated Ice Machine Company, a corporation under the laws of the State of Illinois, engaged in the manufacture and sale of refrigerating and ice-making machines, made a general assignment to one R. E. Jenkins, of the city of Chicago, in said State of Illinois, for the benefit of its creditors. That the capital stock of said Consolidated Ice Machine Company, at said time consisted of two thousand shares of the par value of one hundred dollars each, and that this plaintiff was the owner of twenty-five of said shares. That the assets assigned to said Jenkins consisted largely of a plant in the city of Chicago, for the manufacture of its machines, of patent rights, outstanding accounts and the good will of its business established by about six years of constant business by it conducted.

That the defendant The De La Vergne Refrigerating Company was and is engaged in a similar business, and that the defendant John C. De La Vergne is, and at the times herein referred to, was the president of said company, and the principal stockholder therein.

That the defendants De La Vergne and The De La Vergne Refrigerating Machine Company deeming it to their advantage and interest to acquire the assets and good will of said Consolidated Ice Machine Company, did on or about the 16th day of April, 1891, represent to this plaintiff and to other stockholders of said Consolidated Ice Machine Company, that although the said De La Vergne Refrigerating Company was incorporated under the laws of the State of New York, with a capital only of three hundred and fifty thousand dollars divided into thirty-five hundred shares of the par value of one hundred dollars each, that yet its net assets were fully worth one million four hundred thousand dollars; and that said defendants did thereupon propose to either increase the capital of the defendant The De La Vergne Refrigerating Machine Company to two million

dollars, or by forming a new corporation with such an amount of capital to succeed the defendant corporation, and further proposed that this plaintiff and other stockholders of said Consolidated Ice Machine Company for the considerations hereinafter stated should sell and convey to defendant The De La Vergne Refrigerating Company all their right, title and interest in and to the assets of
7 said Consolidated Ice Machine Company, subject to the payment of its obligations, and subject to the custody thereof in the legal custodian, the said R. E. Jenkins, assignee.

That this plaintiff and other stockholders of said Consolidated Ice Machine Company, representing together all of the stock of said company which had been issued, being willing to enter into such an arrangement, the defendants did thereupon enter into a contract and agreement in writing with him and also with said other stockholders, in duplicate, on or about said 16th day of April, 1891, of which agreement a copy was retained by the defendants, and in and by which this plaintiff, and other stockholders of said Consolidated Ice Machine Company, representing all of the stock thereof which had been issued, did at the request of the defendants, bargain, sell and convey unto the defendant The De La Vergne Refrigerating Company, all their rights, title and interest in and to the assets of said Consolidated Ice Machine Company, subject to the payment of the obligations of the said company and subject to the custody thereof in the legal custodian, R. E. Jenkins, the assignee of said company.

That this plaintiff and the other stockholders of the said Consolidated Ice Machine Company did also bind themselves by the said agreement, within ten days from the date thereof, to wit, April 16th, 1891, to assign to defendant John C. De La Vergne, for the benefit of the defendant The De La Vergne Refrigerating Machine Company, all the stock of said Consolidated Ice Machine Company, which had been issued, and which plaintiff and said other stockholders guarantee to be full-paid stock and that within ten days after said 16th day of April, 1891, to wit, on the twenty fifth day of April, 1891, the plaintiff and said other stockholders complied with said undertaking by signing and delivering to defendant De La Vergne all the stock of said Consolidated Ice Machine Company which had been issued, and which stock, at said time, was full-paid stock.

And plaintiff states that the defendants, on their part, by said contract, did covenant and agree that the net assets of the defendant The De La Vergne Refrigerating Company were fully worth one million four hundred thousand dollars, not including therein the assets and rights purchased and acquired by said agreement; and the defendants further covenanted and agreed that within sixty days after the assignment to defendant De La Vergne of said stock of the Consolidated Ice Machine Company, they, said defendants,
8 would issue and deliver to the stockholders of said Consolidated Ice Machine Company, one of whom as already stated, was the plaintiff, full-paid stock of defendant The De La Vergne Refrigerating Machine Company, to the amount of one

hundred thousand dollars, and which stock, so to be issued, should be issued to said stockholders respectively in certain proportions therein set forth, the proportion agreed to be issued and delivered to this plaintiff being five two-hundredths ($\frac{5}{200}$) thereof, or twenty-five shares of the par value of one hundred dollars per share.

And plaintiff states that defendants further covenanted and agreed by said writing that said stock so to be issued to plaintiff and other stockholders of the Consolidated Ice Machine Company, amounting to one hundred thousand dollars in the aggregate as aforesaid, should represent not less than one-fifteenth part of the net assets of said De La Vergne Refrigerating Machine Company, and that no additional stock should be issued by said company, or in any new company that might be organized to take its place, beyond one million five hundred thousand dollars par value, without actual value being first received by said company, the purpose thereof being that the shares of said De La Vergne Refrigerating Machine Company should be actually worth their par value, the defendants further agreeing in order to accomplish such purpose, that plaintiff and other stockholders of said Consolidated Ice Machine Company might have until August 1st, 1891, to verify the statements of defendants made in said agreement as to values, and that if on examination it should be ascertained that the actual value of the said assets was not in accordance with the said covenants and undertakings of defendant, that then the stockholders of said Consolidated Ice Machine Company, of whom plaintiff was one, would have the right to demand that said stock so to be issued should be made to accord with said covenants as to value, and defendants did further covenant and agree to make said stock represent said values.

Plaintiff further states that in and by said contracts it was further agreed by it and also by other stockholders of said Consolidated Ice Machine Company to accept in lieu of all the stock agreed to be issued to them collectively, as hereinbefore stated, the sum of one hundred thousand dollars in cash at the option of defendant De La Vergne, and that plaintiff and other stockholders of said Consolidated Ice Machine Company also further agreed with defendants, that they would not for a period of ten years from said 16th day of April, 1891, enter into or become connected with the sale of refrigerating or ice-making machines, directly or indirectly, within the United States of North America, excepting the State of Montana.

And plaintiff states that it has complied with all the terms and conditions of said agreement, as have all the other former stockholders of said Consolidated Ice Machine Company, and that although he did, within ten days after April 16th, 1891, as did all the other former stockholders of said Consolidated Ice Machine Company, deliver to defendant De La Vergne his stock in said Consolidated Ice Machine Company, which stock defendant has ever since retained, the defendants did not within sixty days thereafter, nor did they since, issue and deliver to this plaintiff five two-hundredths ($\frac{5}{200}$) of said one hundred thousand dollars' worth of stock, as they agreed they would do, nor did they within said sixty days, nor since, pay plaintiff the cash, in lieu thereof, although

plaintiff has frequently demanded of defendants the one or the other.

By reason of which premises plaintiff has been damaged in the sum of twenty-five hundred dollars, for which, with costs, — prays judgment.

By RASSIEUR & SCHNURMACHER, *Attorneys.*

(*Affidavit.*)

STATE OF MISSOURI, }
City of St. Louis, } ss :

Leo Rassieur, agent for plaintiff, being duly sworn on his oath says that the plaintiff has a just demand against the De La Vergne Refrigerating Machine Company and John C. De La Vergne, and that the amount which affiant believes plaintiff ought to recover after allowing all just credits and set-offs is twenty-five hundred dollars, now due, and that he has good reasons to believe and does believe that the defendants are non-residents of the State of Missouri and that the defendant The De La Vergne Refrigerating Machine Company, is a corporation whose chief office or place of business is out of the State of Missouri.

LEO RASSIEUR.

Subscribed and sworn to before me, this 2nd day of July, 1892.

PHILIP H. ZEPP,

Clerk Circuit Court, City of St. Louis.

And upon the same day said plaintiff executed and filed an attachment bond in said cause, in words and figures as follows, to wit :

(*Attachment Bond.*)

Know all men by these presents, that we, The German Savings Institution as principal and Frederick W. Meister and Richard Hospes as securities, are indebted to the State of Missouri, in the sum of five thousand dollars, for the payment whereof we bind
10 ourselves, our heirs, executors and administrators, jointly and severally firmly by these presents.

Sealed with our seals, and dated at St. Louis, this second day of July, eighteen hundred and ninety-two.

The condition of this obligation is such, that whereas, The German Savings Institution a corporation is about to commence a suit by attachment in the circuit court city of St. Louis, against The De La Vergne Refrigerating Machine Company, and John C. De La Vergne, are defendants, returnable to the October term, 1892, thereof, wherein the sum sworn to is twenty-five hundred dollars and no cents.

Now, if the said plaintiff shall prosecute its action without delay, and with effect, refund all sums of money that may be adjudged to be refunded to the defendant, or found to have been received by the plaintiff, and not justly due to it and pay all damages and costs that may accrue to any defendant, garnishee or interpleader by reason

of the attachment, or any process or proceeding in the suit, or by reason of any judgment or process thereon, and pay all damages and costs that may accrue to any sheriff, or other officer by reason of acting under the writ of attachment, following the instructions of the plaintiff, then this obligation to be void, otherwise to remain in full force.

GERMAN SAVINGS INSTITUTION, [SEAL.]
By F. W. MEISTER, *President*. [SEAL.]
F. W. MEISTER. [SEAL.]
RICHARD HOSPES. [SEAL.]

Approved this 2nd day of July, 1892.
[SEAL.]

PHILIP H. ZEPP,
Clerk Circuit Court.

Upon the filing of said petition and affidavit, and the execution of said bond, a writ of attachment was issued from the office of the said clerk and delivered to the sheriff of the city of St. Louis.

Said writ of attachment is in words and figures as follows, to wit:

(*Writ of Attachment.*)

CITY OF ST. LOUIS, ss:

The State of Missouri to the sheriff of the city of St. Louis, Greeting:

We command you to attach the De La Vergne Refrigerating Machine Company and John C. De La Vergne by all and singular their lands, tenements, goods, chattels, rights, moneys, credits, evidences of debt and effects, or so much thereof as shall be sufficient to
11 satisfy the plaintiff's claim as sworn to, to wit, the sum of twenty-five hundred dollars and — cents, with interest and costs of suit, in whose hands or possession soever the same may be found in your bailiwick, and that you summon the said The De La Vergne Refrigerating Machine Company and John C. De La Vergne to appear at the next term of the circuit court before the judges thereof, on the first day of said term, to be holden at the city of St. Louis, on the first Monday of October next, then and there to answer the action of the plaintiff German Savings Institution, a corporation as set forth in the annexed petition and also that you summon as garnishees all persons in whose hands or possession soever any personal property, rights, credits, evidences of debt, effects or money of the defendants may be, or who may be named by the plaintiff or its attorney as garnishees, and particularly that they be and appear before the judges of our said court, on the first day of the term afore-said, then and there to answer unto what may be objected against them; and have you then and there this writ.

Witness Philip H. Zepp, clerk of our said court, with the seal thereof hereunto affixed, at office in the city of St. Louis, this 2nd day of July, in the year of our Lord eighteen hundred and ninety-two.

[SEAL.]

PHILIP H. ZEPP, *Clerk.*

Thereafter the said sheriff of the city of St. Louis made his returns of service upon the said writ, in words and figures as follows, to wit:

(Sheriff's Returns.)

Executed this writ in the city of St. Louis, Mo., on this second day of July, 1892, by levying upon and taking into my possession as the property of the defendants within named the following-described property situated in the buildings on southeast corner of Eighth street and Park avenue, to wit: 378 assorted iron wrenches; 325 assorted sizes steel wrenches; about 1,500 — Jessup steel; two (2) new ice-machine shafts; one (1) new De La Vergne double-acting ice machine; one (1) complete beer-cooler, 32 pipes high and eighteen feet long; one (1) iron planer No. 2 (New Haven); one (1) Imperial iron lathe; one (1) New Haven iron lathe; one (1) Heine boiler; one (1) Atlas engine; one (1) Hooker air pump; one (1) Hooker feed-pump; a lot of shafting pulleys and belting; one (1) Arctic ice machine; one (1) Ring ice machine; and the office fixtures and furniture and one (1) large iron safe; of which property the said The De La Vergne Refrigerating Machine Company — suffered to retain the possession on the execution and delivery to me — a bond for the delivery of said property unto me, when and where the court may direct, which bond is herewith filed, said bond being executed and delivered to me July 16th, 1892, whereupon on same day I withdrew my watchman from further care and keeping of said property.

The following-described property has also been levied upon by me under and by virtue of this writ simultaneously with above-mentioned levy, but I released the same from levy on 16th day of July, 1892, viz: One platform scale; one truck, one scale, one crab, 3 forges, one air pump, lot of iron-pipe brackets, and band fitting, four name and gauge plates, 1 steam-exhauster, 4 jacks, 1 tar tank, 1 anvil, 1 tool for forging tools, lot of blacksmith tools, 5 anvils, lot of pipe-condenser, oil-cooler, and tank pockets, six iron bands for shafting, 1 block and tackle, 1 chain block, 3 tables, 1 desk, 4 brass cocks, 2 rolls rubber packing, a lot of assorted De La Vergne straight flanges, blank flanges, and tee flanges, 2 galvanized-iron steam-condensers, five iron filters, 24 temperature coils and fittings, 3 sand-filters, 1 number 6 pump, lot of galvanized-iron pipe, about 4,000 pads of iron, 4 forges, 20 sheets of steel, 3 iron tanks and stands, 1 upright steam boiler, lot of disks, with clips complete, 1 complete oil-cooler, 17 pieces 5" pipe, lot of tools, 5 oil tanks and contents, lot of galvanized-iron ice cans, 14 dumpers for ice sprinklers, one sheet-iron shear, 9 incomplete dumpers, 6 gas blow-pipes, and air tank for soldering, 2 pipe cutting and thread machines, 1 grinder, 1 (ny) safety engine, 1 iron drill-press, 3 ice machines, 5 heating coils, 1 grindstone, 9 bench vises, 3 pipe vises, 2 blast fans, 1 punch-machine, 2 ammonia tanks, 1 hand shaft, a lot of elbows, crosses and flanges, lead washers for flanges, solder, one hundred cock wrenches, lot of T's, lot of compressor lead washers, window glass, rubber hose, 2 dash-pots, leather belting, valves, 1 plunger for pump, 1 6-foot oil-

cooler, a lot of tools, return bends, relievers, iron rings, charcoal, mineral wool, paper, pulleys, lumber, work-benches, nails, rope, steam fittings, clamps, stands, couplings, return-bends headers, water outlets, can-fillers, castings, hand wheels, 1 ice-can carriage, monkey-wrenches, paint and oil, flange elbows, cock springs, gauges, nuts and bolts and cans.

Within-named defendants cannot be found in the city of St. Louis.

PATRICK M. STAED, *Sheriff*,
By — — —, *Deputy*.

Levy.....	\$1.00
N. E.....	1.00
Bond.....	.50
Watchman.....	51.00
Insurance.....	12.00
Labor & inventory.....	5.00
	<hr/>
	\$70.50

13 No goods, chattels or real estate found in the city of St. Louis, belonging to the within-named defendants, — whereon to levy the writ hereto attached, and make the debt and cost or any part thereof; thereupon, by order of plaintiff's attorney I executed said writ in said city of St. Louis, at the hour of 5 o'clock — minutes, p. m., on the 2nd day of July, 1892, by declaring in writing to Columbia Brewing Company, a corporation, by delivering said written declaration, directed to said corporation, to Charles F. Koehler, president of said corporation that I attached in its hands, all debts due from it to said defendants or either of them, and all goods, moneys, effects, rights, credits, chattels, choses in action, and evidences of debt of said defendants or either of them or as much thereof, as would be sufficient to satisfy the debt, interest and costs, in this suit, and by summoning it in writing as garnishee; and I at the same time, by said direction, further executed said writ by summoning said corporation as garnishee by declaring to it in writing, by delivering a summons of garnishment in writing directed to said corporation to said Charles F. Koehler, president thereof, that I summoned it to appear at the return term of said writ, to wit: on the first Monday of October next, to answer such interrogatories as may be exhibited to it by the within-named plaintiff.

PATRICK M. STAED,
Sheriff of the City of St. Louis,
By JOHN A. MURPHY, *Deputy*.

St. Louis, Mo., July 2, 1892.

No goods, chattels or real estate found in the city of St. Louis, belonging to the within-named defendant, —, whereon to levy the writ hereto attached and make the debt and costs, or any part thereof; thereupon, by order of plaintiff's attorney, I executed said writ in said city of St. Louis, at the hour of 5 o'clock and 10 min-

utes p. m., on the 2nd day of July, 1892, by declaring in writing to Anheuser-Busch Brewing Association, a corporation by delivering said written declaration, directed to said corporation, to Eugene Muehlemaun, secretary of said corporation, that I attached in his hands, all debts due from it to said defendants, or either of them, and all goods, moneys, effects, rights, credits, chattels, choses in action and evidences of debt of said defendants or either of them, or as much thereof as would be sufficient to satisfy the debt, interest, and costs in this suit, and by summoning it in writing as garnishee; and I at the same time by said direction further executed said writ by summoning said corporation as garnishee by declaring to it in writing, by delivering a summons of garnishment in writing directed to said corporation, to said Eugene Muehlemaun secretary thereof, that I summoned it — appear at the return term of said writ, to wit, on the first Monday of October next, to answer such interrogatories as may be exhibited to it, by the within-named plaintiff.

PATRICK M. STAED,
Sheriff of the City of St. Louis,
 By EDWARD C. WINTER, *Deputy.*

St. Louis, Mo., July 2, 1892.

No goods, chattels or real estate found in the city of St. Louis belonging to the within-named defendant, —, whereon to levy the writ hereto attached, and make the debt and costs, or any part thereof; thereupon, by order of plaintiff's attorney, I executed said writ in said city of St. Louis, at the hour of 5 o'clock and 35 minutes p. m. on the 2nd day of July, 1892, by declaring in writing to National Brewing Company, a corporation by delivering said written declaration, directed to said corporation, to B. Griesedieck, secretary of said corporation, that I attached in its hands, all debts due from it to said defendants, or either of them, all goods, moneys, effects, rights, credits, chattels, choses in action and evidences of debt of said defendants, or either of them, or as much thereof as would be sufficient to satisfy the debt, interest and costs in this suit, and by summoning it in writing as garnishee, and I, at the same time, by said direction further executed said writ by summoning said corporation, as garnishee, by declaring to it in writing, by delivering a summons of garnishment in writing directed to said corporation to said B. Griesedieck, secretary thereof, that I summoned it to appear at the return term of said writ, to wit, on the first Monday of October next, to answer such interrogatories as may be exhibited to it by the within-named plaintiff.

PATRICK M. STAED,
Sheriff of the City of St. Louis,
 By PATRICK J. HENAGHAN, *Deputy.*

St. Louis, Mo., July 2, 1892.

And afterwards, to wit, on the 16th day of July, 1892, the defendant, The De La Vergne Refrigerating Machine Company, executed

and delivered to the sheriff of the city of St. Louis, a bond on attachment for delivery of property, in words and figures as follows, to wit:

(Bond on Attachment for Delivery of Property.)

Know all men by these presents, that we, The De La Vergne Refrigerating Machine Company, as principal, and Ellis Wainwright and Wm. F. Nolker, as sureties, are held and firmly bound unto Patrick M. Staed, sheriff of the city of St. Louis, Missouri, his successor in said office or the assignee of said Patrick M. Staed, 15 sheriff, or his successor in said office of sheriff in the sum of five thousand dollars, for the payment whereof we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated this sixteenth day of July, in the year of our Lord, one thousand eight hundred and ninety-two. The condition of this obligation is such, that, whereas, a writ of attachment issued from the clerk's office of the circuit court, city of St. Louis, in favor of German Savings Institution, a corporation, against the De La Vergne Refrigerating Machine Company, and John C. De La Vergne has issued to the sheriff of the city of St. Louis, and has been by him levied on certain personal property, to wit, three hundred and seventy-eight (378) assorted wrenches (iron); 325 assorted sizes steel wrenches; about 1,500 pounds Jessup steel; two (2) new ice-machine shafts; one (1) new De La Vergne double-acting ice machine; one (1) complete beer-cooler 32 pipes high and 18 feet long; one iron planer No. 2 (New Haven); one Imperial iron lathe; one (1) New Haven iron lathe; one Heine boiler; one (1) Atlas engine; one (1) Hooker air pump; one (1) Hooker feed-pump; a lot of shafting, pulleys and belting; one (1) Arctic ice machine; one Ring ice machine; and the office fixtures and furniture, and one (1) large iron safe, all contained in the building situated on the southeast corner of Eighth street and Park avenue in city of St. Louis, Mo., of which property the said The De La Vergne Refrigerating Machine Company — suffered to retain the possession, on the execution hereof:

Now, if the said The De La Vergne Refrigerating Machine Company shall deliver said property, and every part thereof, unto the sheriff aforesaid, when and where the court may direct and shall abide the judgment of the court, then this obligation shall be void; else it shall remain in force.

THE DE LA VERGNE REFRIGERATING MACHINE COMPANY, [SEAL.]

By CHAS. NAGEL, *Its Att'y.*
ELLIS WAINWRIGHT.

WM. F. NOLKER.

[SEAL.]
[SEAL.]
[SEAL.]

Signed, sealed and delivered in presence of—
LOUIS HOLY.

And afterwards, at the October term, 1892, of said court, the following proceedings were had in said cause, to wit:

16 (*Petition and Bond for Removal Filed and Order for Removal.*)

WEDNESDAY, October 5th, 1892.

GERMAN SAVINGS INSTITUTION, a Corporation,	}	(88921.)
vs.		
THE DE LA VERGNE REFRIGERATING MACHINE Company and John (—) De La Vergne.		

On petition of the defendants filed herein this day, it is ordered by the court that upon their giving bond in the sum of two hundred and fifty dollars to be approved by the court, the clerk of this court do forthwith certify to the eastern division of the circuit court of the United States for the eastern district of Missouri, a full, true and complete transcript of the record and proceedings of the above-entitled cause, as fully as the same remains of record in his office.

Bond approved in open court and filed.

Which petition for removal and bond, are respectively in words and figures as follows, to wit:

(*Petition for Removal.*)

In No. 3 Circuit Court, City of St. Louis, October Term, 1892.

GERMAN SAVINGS INSTITUTION, Plaintiff,	}	No. 88921.
vs.		
THE DE LA VERGNE REFRIGERATING MACHINE COM- pany and John C. De (—) Vergne, Defendants.		

Petition for removal of this cause to the United States circuit court for the eastern division of the eastern judicial district of Missouri.

To the honorable the circuit court of the city of St. Louis, State of Missouri:

Your petitioners respectfully show that they are the defendants in the above-entitled suit; that the defendant The De La Vergne Refrigerating Machine Company is a corporation duly organized and existing under and by virtue of the laws of the State of New York, and that it is now and was at the time of the bringing of this suit, a non-resident of the State in which this suit was brought, to wit, the State of Missouri; that the defendant John C. De La Vergne is now and was at the time of the bringing of this suit, a non-resident of the State in which this suit was brought, to wit, the State of Missouri, that said German Savings Institution, plaintiff in this suit was at the time of the bringing of this suit, and still is a corporation duly organized under the laws of the State of Missouri, and a resident of the city of St. Louis, State of Missouri, within the east-

ern division of the eastern judicial district of Missouri; and
 17 that the matter and amount in dispute in the said suit exceeds exclusive of interest and costs the sum or value of two thousand dollars.

That the said suit is of a civil nature to recover as alleged for breach of contract.

That the controversy in said suit is wholly between citizens of different States, to wit, between your said petitioners, The De La Vergne Refrigerating Machine Company, which company was at the time of the bringing of this suit, and still is a corporation duly organized and existing under and by virtue of the laws of the State of New York, and John C. De La Vergne who was at the time of the bringing of this suit, and still is a citizen of the State of New York, and the said plaintiff, who was at the time of the bringing of said suit, and still is a citizen of the State of Missouri.

And your petitioners offer herewith a bond with good and sufficient surety for their entering in said circuit court of the United States on the first day of its next session, a copy of the record in this suit, and for paying all costs that may be awarded by said circuit court, if said court shall hold that this suit was wrongfully or improperly removed thereto.

And your petitioners pray this honorable court to proceed no further herein, except to make an order for the removal of this cause to said United States circuit court, and to accept the said surety and bond, and to cause the record herein to be removed into said circuit court of the United States in and for the eastern division of the eastern judicial district of Missouri and they will ever pray.

THE DE LA VERGNE REFRIGERATING
 MACHINE COMPANY AND
 JOHN C. DE LA VERGNE,
 By CHAS. NAGEL, *Their Attorney.*

STATE OF MISSOURI, {
City of St. Louis, } ss:

Charles Nagel being duly sworn deposes and says: I am the attorney for the defendants in the above-entitled cause, the petitioners herein. The foregoing petition is true to my own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters I believe it to be true.

CHAS. NAGEL.

(Bond for Removal.)

Know all men by these presents, that we, The De La Vergne Refrigerating Machine Company and John C. De La Vergne
 18 as principals and Charles Nagel as surety, are held and firmly bound unto German Savings Institution in the penal sum of two hundred and fifty dollars, for the payment whereof well and truly to be made unto the said German Savings Institution, its successors and assigns, we bind ourselves, our heirs, repre

representatives and assigns, jointly and severally, firmly by these presents.

Yet, upon these conditions: That said The De La Vergne Refrigerating Machine Company and John C. De La Vergne having petitioned the circuit court of the city of St. Louis, State of Missouri, for the removal of a certain cause therein pending, wherein German Savings Institution is plaintiff and The De La Vergne Refrigerating Machine Company and John C. De La Vergne are defendants, to the circuit court of the United States, in and for the eastern division of the eastern judicial district of Missouri.

Now, if the said The De La Vergne Refrigerating Machine Company and John C. De La Vergne your petitioners shall enter in the said circuit court of the United States, on the first day of its next session, the copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said circuit court of the United States, if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void; otherwise to remain in full force and virtue.

In witness whereof the said The De La Vergne Refrigerating Machine Company has caused these presents to be signed and said John C. De La Vergne and said sureties have hereunto set their hands and seals this 5th day of October, 1892.

THE DE LA VERGNE REFRIGERATING	
MACHINE COMPANY,	
By CHAS. NAGEL, <i>Att'y.</i>	[SEAL.]
JOHN C. DE LA VERGNE,	[SEAL.]
By CHAS NAGEL, <i>His Att'y.</i>	[SEAL.]
CHAS. NAGEL.	[SEAL.]

(Clerk's Certificate.)

STATE OF MISSOURI, }
City of St. Louis, } ss:

I, Philip H. Zepp, clerk of the circuit court, city of St. Louis, within and for the city aforesaid, do hereby certify, that the above and foregoing contains a true, full and complete transcript of the record and proceedings in the above-entitled cause, including the petition and affidavit and bond for removal and the order of removal, as fully as the same remains of record and on file in my office.

In testimony whereof, I hereto set my hand and affix [SEAL.] the seal of said court, this 2nd day of December, 1892.

PHILIP H. ZEPP, *Clerk.*

And afterwards, to wit, on March 19, 1896, by leave of court an amended answer was filed in said cause, which is in words and figures as follows, to wit:

(Amended Answer.)

In the Circuit Court of the United States for the Eastern Division
of the Eastern Judicial District of Missouri.

GERMAN SAVINGS INSTITUTION, Plaintiff,

vs.

THE DE LA VERGNE REFRIGERATING MACHINE CO. and JOHN
C. De La Vergne, Defendants. }

Now come the defendants in the above-entitled action and file this their amended answer to the petition of the plaintiff herein.

First. They admit that the defendant, The De La Vergne Refrigerating Machine Company is and was at the times stated in said petition a corporation duly organized and existing under the laws of the State of New York, and having its chief office and place of business out of this State and in the State of New York, and that the defendant, John C. De La Vergne, is a non-resident of the State of Missouri and resides in the State of New York in the city of New York.

All other matters and things in the said petition contained are hereby denied.

Second. For further answer to the said petition, these defendants allege that no assets of any kind whatever belonging to the said Consolidated Ice Machine Company have ever come into the possession of these defendants or either of them, but that all of the assets of the said company transferred to the said R. E. Jenkins, the assignee of the said company for the benefit of its creditors, including its good will, if any it had, remained in the custody, possession and control of the said Jenkins and were by him disposed of under the orders and direction of the probate court of Cook county, Illinois, in the due course of law for the benefit of the creditors of the said company, and the said assets were and are insufficient to discharge the proved liabilities against the same. And these

20 defendants allege that no part of the assets of said Consolidated Ice Machine Company of any kind whatsoever have ever been received by or tendered to these defendants or either of them under the said contract. And these defendants aver that the said alleged contract was not, nor were any of the covenants or agreements or stipulations alleged in said petition to be contained therein, kept, observed or performed by said plaintiff, or by any of said alleged stockholders in said alleged Consolidated Ice Machine Company, on the contrary, said plaintiff and his alleged costockholders in said pretended Ice Machine Company failed to assign or transfer to the defendants or either of them any of said shares of stock in the said pretended Consolidated Ice Machine Company, but neglected and refused to assign said shares or any of them within the time stated in the said petition that the same were to be assigned, or at any time prior to the institution of this suit; and the defendants further allege that the said plaintiff and the said

alleged stockholders of said pretended Consolidated Ice Machine Company did not perform or keep the said covenants or agreements alleged in said petition to be made by them, to refrain for a period of ten years from the date of said pretended contract set forth in said petition, from entering into or becoming connected with the sale of refrigerating or ice-making machines directly or indirectly in the United States of North America, excepting the State of Montana, and excepting the business of said refrigerating company or of such company as might become its successor and purchaser of its rights, but on the contrary, the said plaintiff and the remaining alleged stockholders of said pretended Consolidated Ice Machine Company did embark, soon after the date of said pretended contract in the business of selling refrigerating or ice-making machines in the United States of North America, outside of the said State of Montana, which said business so embarked in by them had no connection with or relation to the business of the defendant, The De La Vergne Refrigerating Machine Company, or with any successor of it, or with any purchaser of all or of any part of its rights.

Third. For a further defense to said petition these defendants allege that the said alleged contract sued upon in the petition purports to have been executed in behalf of the defendant, The De La Vergne Refrigerating Machine Company, by John C. De La Vergne as president of the said company, that the said John C. De La Vergne had no right, power, or authority to execute the said contract on behalf of the said company; that no benefits of any kind ever accrued to the said company under the said contract; that the said company never received any of the consideration moving to

it under the said contract; that it never accepted or received
21 any of the assets of the said Consolidated Ice Machine Company, nor any of the stock of the said company; that it never in any manner ratified or approved the said contract, but on the contrary distinctly rejected the same. And these defendants allege that the plaintiff well knew at the time of making the said pretended contract that the said John C. De La Vergne had no right, power or authority to make the same on behalf of the said De La Vergne Refrigerating Machine Company, and that the same was not binding upon the said company.

Fourth. For a further defense to said petition these defendants allege that on or about the 12th day of September, A. D. 1891, these defendants notified the plaintiff that they would not be bound by the alleged contract set forth in the petition and would not perform the same; that (it) at the time of so notifying the plaintiff no part of the consideration moving under the said pretended contract to these defendants had been received by them or either of them; that the plaintiff acquiesced in the rejection of the said alleged contract by the defendants; that these defendants relying upon the acquiescence of the plaintiff in their rejection of the said alleged contract abandoned all interest in the said Consolidated Ice Machine Company and its affairs, as the plaintiff well knew and made no attempt to acquire its assets or any part of them; that the plaintiff and his

associates, shareholders in the Consolidated Ice Machine Company, after these defendants had so as aforesaid given notice of their rejection of the said contract, and acquiescing therein, did combine with each other and as well with other persons, firms and companies who were engaged in the manufacture and sale of machines like those manufactured and sold by the Consolidated Ice Machine Company and who were so engaged in competition and rivalry with the defendant, The De La Vergne Refrigerating Machine Company, to purchase the plant and machinery of the Consolidated Ice Machine Company and did purchase the same for and on behalf of George, John and Arthur J. Featherstone who were rivals and competitors in business of the De La Vergne Refrigerating Machine Company to be used by the said Featherstones in its business in competition and rivalry with the said De La Vergne Company and the same were and are being so used and no notice was given to these defendants until this suit was brought, and not otherwise (then) by the bringing of this suit, that the plaintiff or any of its associates, shareholders in the said Consolidated Ice Machine Company regarded the (the) said alleged contract as a subsisting one between the parties thereto, by which time the assets of the said Consolidated Ice Machine Company had all been disposed of by the assignee of

22 the said Consolidated Ice Machine Company in the regular course of administering the affairs of said company under the orders of the court having charge of the assignment of the said company and the plant and machinery of the said company together with its alleged good will had been acquired by the said Featherstone- and were being used in competition with the defendant, The De La Vergne Refrigerating Machine Company, whereby and wherefore the plaintiff is now barred and estopped from asserting any right or claim under said contract against these defendants or either of them.

Fifth. For (—) further defense to said petition these defendants allege that the said alleged contract set forth in the petition was never authorized by the said Consolidated Ice Machine Company to be made in its behalf and the persons assuming to act for it had no right, power or authority to bind it by the said alleged contract, and the same was as to the said company without authority and void; and these defendants allege that all the shareholders of the said Consolidated Ice Machine Company did not unite in the said alleged contract nor agree thereby to transfer their stock to the defendant John C. De La Vergne for the benefit of the De La Vergne Refrigerating Machine Company, but allege the fact to be that the estate of Ed. Jungenfield which owned ninety shares of said stock never agreed nor was bound to transfer the same, nor were the executors of the said estate ever authorized or empowered to transfer the same, and that Carl Jungenfield, a minor who owned seventy shares of the said stock never agreed or was bound to transfer the same, and these defendants allege that they did not nor could, nor did or could either of them, in virtue of the said alleged contract acquired any right or interest in or to the assets of the said Consolidated Ice Machine Company, but that the said alleged contract

in so far as it assumed to transfer any right or interest in or to said assets was wholly unauthorized, void, inoperative, and of no effect, and the plaintiff is therefore not entitled to maintain any action under the same.

Sixth. For a further defense to the said petition, this defendant charges that the said contract set forth in the petition was in fact a contract for the (*purpose*) by the defendant, The De La Vergne Refrigerating Company, of all the stock of the Consolidated Ice Machine Company; that the said John C. De La Vergne who assumed to enter into said contract for and on behalf of the De La Vergne Refrigerating Machine Company had no right, power, or authority so to do, and had no right, power, or authority to bind the said company by said contract, and the said De La Vergne Refrigerating

Machine Company was not authorized by its charter nor was
23 it authorized by the laws of the State of New York or by the laws of the State of Illinois, to purchase or acquire all or any of the stock of the Consolidated Ice Machine Company, and the said alleged agreement set forth in the petition herein was beyond the powers of the De La Vergne Refrigerating Machine Company, illegal and void, and these defendants further allege that no part of the alleged consideration moving to the said De La Vergne Company under said alleged agreement was ever received or retained by the said company or by any one on its behalf; and that it was the right and duty of the said company to refuse, as it did do, to consummate the said alleged agreement, the same being in excess and beyond the powers conferred upon it by its charter, and by the laws of the State of New York, and the laws of the State of Illinois.

Seventh. For a further defense to the said petition these defendants allege that the said Consolidated Ice Machine Company was a corporation created by and existing under the laws of the State of Illinois and that it was so incorporated for the purpose of manufacturing and selling ice or refrigerating machines; that the De La Vergne Refrigerating Machine Company was a corporation created by and existing under the laws of the State of New York and was so incorporated for the purpose of making and selling ice or refrigerating machines; that the two said companies operated throughout the United States and were rivals and competitors in business; that the alleged contract set forth in the said petition was for the acquisition by and for the said De La Vergne Refrigerating Machine Company of all the stock of the said Consolidated Ice Machine Company; that the sole purpose of the said alleged contract and its necessary effect if carried out was to absolutely destroy the competition of the said Consolidated Ice Machine Company; that neither of the said companies had any right or authority under their charters or under the laws of Illinois or of New York to enter into such contract and the alleged contract is against public (*public*) law and policy and is wholly void.

Eighth. For a further defense to the said petition, these defendants show that the De La Vergne Refrigerating Machine Company was a corporation created by and existing under the laws of the State of New York, that its capital stock was \$350,000; that by the

said alleged agreements set forth in the petition herein, it was attempted to be stipulated by the parties to the said agreement, including the plaintiff, that the defendant, The De La Vergne Refrigerating Machine Company, should increase its capital stock to two million dollars and (to) pay to the plaintiff and his associate shareholders in the Consolidated Ice Machine Company \$100,000

24 of such increased issue of the capital stock of the De La Vergne Refrigerating Machine Company, and these defendants show that by its charter and under the laws of the State of New York, the said De La Vergne Refrigerating Machine Company had no authority, power or right to stipulate for an increase of its capital stock, as by the contract set forth in the petition it was attempted to do, and that said contract was beyond the powers of the said De La Vergne Refrigerating Machine Company, was in contravention of the laws of the State of New York, against public policy and void, and the plaintiff is not entitled to recover under the same. And these defendants allege that no part of the alleged consideration moving to the said De La Vergne Refrigerating Machine Company under said alleged agreement was ever received or retained by the said company or any one in its behalf.

Wherefore, having fully answered defendants pray to be hence dismissed with their costs in this behalf expended.

CHAS. NAGEL,
BOPYE, PRIEST & LEHMANN,
Attorneys for Defendants.

* * * * *

And afterwards, to wit, on the 23rd day of March, A. D. 1896, there was filed in said cause a reply to amended answer, in words and figures as follows, to wit:

(Reply to Amended Answer.)

In the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, March Term, 1896.

GERMAN SAVINGS INSTITUTION, Plaintiff,	}	Cause No. 3697.
vs.		
THE DE LA VERGNE REFRIGERATING MACHINE Company and John C. De La Vergne, Defendants.		

Now again comes plaintiff and for reply to the amended answer of the defendants herein, denies each and every allegation of new matter therein contained, and again prays judgment as in the petition.

By LEO RASSIEUR AND
B. SCHNURMACHER,
Attorneys.

* * * * *

25 And afterwards to wit, on the 20th day of May, A. D. 1896, the following among other proceedings were had and appear of record in said cause, to wit:

(Death of Defendant John C. De La Vergne Suggested.)

LEO RASSIEUR	}	3695.
vs.		
DE LA VERGNE REFRIGERATING MACHINE CO. ET AL.		

FREDERICK WIDMAN	}	3696.
vs.		
SAME.		

GERMAN SAVINGS INSTITUTION	}	3697.
vs.		
SAME.		

EDWARD MALLINCKRODT	}	3698.
vs.		
SAME.		

LEO RASSIEUR, Trustee,	}	3699.
vs.		
SAME.		

ANNA JUNGENSELD	}	3700.
vs.		
SAME.		

EDMUND JUNGENSELD'S ADM'R	}	3701.
vs.		
SAME.		

JACOB W. SKINKLE, to Use, &c.,	}	3726.
vs.		
SAME.		

Now at this day the death of John C. De La Vergne one of the defendants in each of the above-entitled causes is suggested to the court.

And afterwards, to wit, on the 5th day of November A. D. 1896, the following further proceedings were had and appear of record in said cause, to wit:

(Appearance of Wm. C. Richardson, Public Administrator, &c., and, by Consent, Suit Revived.)

LEO RASSIEUR, Plaintiff,	}	3695.
vs.		
DE LA VERGNE REFRIGERATING MACHINE CO. ET AL.,		
Defendants.		

Now comes Wm. C. Richardson, public administrator of the city of St. Louis, and as such having charge of the estate of defendant

John C. De La Vergne, deceased, and enters his appearance herein and adopts the pleadings of said defendant De La Vergne, and thereupon by consent of parties it is—

26 Ordered that this suit be revived and proceed against said Richardson as administrator of said defendant John C. De La Vergne, deceased.

And afterwards, to wit: on the 5th day of November, A. D. 1896, the following further proceedings were had and appear of record in said cause, to wit:

(Appearance of Wm. C. Richardson, Public Administrator, etc., and, by Consent, Suit Revived.)

FREDERICK WIDMAN, Plaintiff,

vs.

DE LA VERGNE REFRIGERATING MACHINE CO. ET AL.,
Defendants.

} 3698.

Now comes Wm. C. Richardson, public administrator of the city of St. Louis, and as such having charge of the estate of defendant John C. De La Vergne, deceased, and enters his appearance herein and adopts the pleadings of said defendant De La Vergne, and thereupon by consent of parties it is—

Ordered that this suit be revived and proceed against said Richardson as administrator of said defendant John C. De La Vergne, deceased.

And afterwards, to wit: on the 5th day of November, A. D. 1896, the following further proceedings were had and appear of record in said cause, to wit:

(Appearance of Wm. C. Richardson, Public Administrator, etc., and, by Consent, Suit Revived.)

GERMAN SAVINGS INSTITUTION, Plaintiff,

vs.

DE LA VERGNE REFRIGERATING MACHINE CO. ET AL.,
Defendants.

} 3697.

Now comes Wm. C. Richardson, public administrator of the city of St. Louis, and as such having charge of the estate of defendant John C. De La Vergne, deceased, and enters his appearance herein and adopts the pleadings of said defendant De La Vergne, and thereupon by consent of parties it is—

Ordered that this suit be revived and proceed against said Richardson as administrator of said defendant John C. De La Vergne, deceased.

And afterwards, to wit: on the 5th day of November, A. D. 1896, the following further proceedings were had and appear of record in said cause, to wit:

(*Appearance of Wm. C. Richardson, Public Administrator, etc., and, by Consent, Suit Revived*)

EDWARD MALLINCKRODT, Plaintiff,	} 3698.
vs.	
DE LA VERGNE REFRIGERATING MACHINE CO. ET AL., Defendants.	

Now comes Wm. C. Richardson, public administrator of the city of St. Louis, and as such having charge of the estate of defendant John C. De La Vergne, deceased, and enters his appearance herein and adopts the pleadings of said defendant De La Vergne, and thereupon by consent of parties it is—

Ordered that this suit be revived and proceed against said Richardson as administrator of said defendant John C. De La Vergne, deceased.

And afterwards, to wit: on the 5th day of November, A. D. 1896, the following further proceedings were had and appear of record in said cause, to wit:

(*Appearance of Wm. C. Richardson, Public Administrator, &c., and, by Consent, Suit Revived.*)

LEO RASSIEUR, Trustee, &c., Plaintiff,	} 3699.
vs.	
DE LA VERGNE REFRIGERATING MACHINE CO. ET AL., Defendants.	

Now comes Wm. C. Richardson, public administrator of the city of St. Louis, and as such having charge of the estate of defendant John C. De La Vergne, deceased, and enters his appearance herein and adopts the pleadings of said defendant De La Vergne, and thereupon by consent of parties it is—

Ordered that this suit be revived and proceed against said Richardson as administrator of said defendant John C. De La Vergne, deceased.

And afterwards, to wit: on the 5th day of November, A. D. 1896, the following further proceedings were had and appear of record in said cause, to wit:

(*Appearance of Wm. C. Richardson, Public Administrator, &c., and, by Consent, Suit Revived.*)

ANNA JUNGENFELD, Plaintiff,	} 3700.
vs.	
DE LA VERGNE REFRIGERATING MACHINE CO. ET AL., Defendants.	

Now comes Wm. C. Richardson, public administrator of the city of St. Louis, and as such having charge of the estate of defendant

John C. De La Vergne, deceased, and enters his appearance herein and adopts the pleadings of said defendant De La Vergne, and thereupon by consent of parties it is—

Ordered that this suit be revived and proceed against said Richardson as administrator of said defendant John C. De La Vergne, deceased.

And afterwards, to wit: on the 5th day of November, A. D. 1896, the following further proceedings were had and appear of record in said cause, to wit:

28 (*Appearance of Wm. C. Richardson, Public Administrator, &c., and, by Consent, Suit Revived.*)

EDMUND JUNGENSELDT'S ADM'R, Plaintiff,

vs.

DE LA VERGNE REFRIGERATING MACHINE CO. ET AL.,
Defendants.

} 3701.

Now comes Wm. C. Richardson, public administrator of the city of St. Louis, and as such having charge of the estate of defendant John C. De La Vergne, deceased, and enters his appearance herein and adopts the pleadings of said defendant De La Vergne, and thereupon by consent of parties it is—

Ordered that this suit be revived and proceed against said Richardson as administrator of said defendant John C. De La Vergne, deceased.

And afterwards, to wit: on the 5th day of November, A. D. 1896, the following further proceedings were had and appear of record in said cause, to wit:

(*Appearance of Wm. C. Richardson, Public Administrator, &c., and, by Consent, Suit Revived.*)

JACOB W SKINKLE, to Use, &c., Plaintiff,

vs.

DE LA VERGNE REFRIGERATING MACHINE CO. ET AL.,
Defendants.

} 3726.

Now comes Wm. C. Richardson, public administrator of the city of St. Louis, and as such having charge of the estate of defendant John C. De La Vergne, deceased, and enters his appearance herein and adopts the pleadings of said defendant De La Vergne, and thereupon by consent of parties it is—

Ordered that this suit be revived and proceed against said Richardson as administrator of said defendant John C. De La Vergne, deceased.

And afterwards, to wit: on the 2nd day of February, A. D. 1897, the following further proceedings were had and appear of record in said cause, to wit:

(Order of Consolidation, &c.)

LEO RASSIEUR vs. DE LA VERGNE REFRIGERATING MACHINE CO. ET AL.	} 3695.
FREDERICK WIDMAN vs. SAME.	} 3696.
GERMAN SAVINGS INSTITUTION vs. SAME.	} 3697.
EDWARD MALLINCKRODT vs. SAME.	} 3698.
LEO RASSIEUR, Trustee, vs. SAME.	} 3699.
ANNA JUNGENFELD vs. SAME.	} 3700.
EDMUND JUNGENFELD'S ADM'R vs. SAME.	} 3701.
JACOB W. SKINKLE, to Use, &c., vs. SAME.	} 3726.

Now come said parties by their respective attorneys, the plaintiffs by Rassieur and Schnurmacher, the defendant Wm. C. Richardson, public administrator in charge of estate of John C. De La Vergne, deceased, by W. W. Henderson, and the defendant De La Vergne Refrigerating Machine Co. by Boyle, Priest and Lehmann and Chas. H. Aldrich, and on motion of said last-named defendant, plaintiffs not objecting, it is ordered by the court that the above-entitled causes be consolidated; thereupon a stipulation in writing, waiving a jury, signed by said parties is filed in said consolidated cause.

Defendant De La Vergne Refrigerating Machine Company files a motion to dismiss as to defendant Wm. C. Richardson, public administrator in charge of the estate of J. C. De La Vergne, deceased; which motion having been considered by the court is overruled.

And this cause now coming on for hearing, the trial progressed, but not being concluded at the hour of adjournment, is postponed until tomorrow morning.

Said stipulation waiving a jury in said consolidated cause, is in words and figures as follows, to wit:

(Stipulation Waiving a Jury.)

In the United States Circuit Court for the Eastern Division of the
Eastern Judicial District of Missouri.

LEO RASSIEUR, Plaintiff,	}	No. 3695.
<i>vs.</i>		
THE DE LA VERGNE REFRIGERATING MACHINE CO. and William C. Richardson, Public Administrator of St. Louis City, Defendants.		

FREDERICK WIDMANN, Plaintiff,	}	No. 3696.
<i>vs.</i>		
SAME, Defendants.		

GERMAN SAVINGS INSTITUTION, Plaintiff,	}	No. 3697.
<i>vs.</i>		
SAME, Defendants.		

EDWARD MALLINCKRODT, Plaintiff,	}	No. 3698.
<i>vs.</i>		
SAME, Defendants.		

LEO RASSIEUR, Trustee, Plaintiff,	}	No. 3699.
<i>vs.</i>		
SAME, Defendants.		

ANNA JUNGENSELD, Plaintiff,	}	No. 3700.
<i>vs.</i>		
SAME, Defendants.		

EDMUND JUNGENSELD'S ADM'R, Plaintiff,	}	No. 3701.
<i>vs.</i>		
SAME, Defendants.		

JACOB SKINKLE, to the Use of THE MERCHANTS' NA- tional Bank of Chicago, Plaintiff,	}	No. 3726.
<i>vs.</i>		
SAME, Defendants.		

It is stipulated by and between the parties to the above-entitled causes, that the same may be tried by the court without the aid of a jury, the same being waived hereby.

RASSIEUR & SCHNURMACHER,

Attorneys for Plaintiffs.

W. W. HENDERSON,

Attorney for Defendant Wm. C. Richardson, Public Administrator of the City of St. Louis, and as Such in Charge of the Estate of John C. De La Vergne, Dec'd.

BOYLE, PRIEST & LEHMANN AND
CHAS. H. ALDRICH,

*Attorneys for Defendant The De La Vergne
Refrigerating Machine Co. Only.*

31 And afterwards, to wit, on the 3rd day of February, A. D. 1897, the following further proceedings were had and appear of record in said cause, to wit :

(Trial Progressed.)

3695	Leo Rassieur,	
3696	Frederick Widmann,	
3697	German Savings Institution,	
3698	Edward Mallinckrodt,	
3699	Leo Rassieur, Trustee ;	
3700	Anna Jungenfeld,	
3701	Edmund Jungenfeld's Adm'r,	
3726	Jacob W. Skinkle, Use, &c., Plaintiffs,	} (Consolidated.)
	<i>vs.</i>	
	De La Vergne Refrigerating Machine Co.	
	<i>et al.</i> , Defendants.	

Now at this day come again said parties by their respective attorneys ; thereupon the trial of this cause progressed, but not being concluded at the hour of adjournment, it is ordered that further proceedings herein be continued until tomorrow morning.

And afterwards, to wit, on the 4th day of February, A. D. 1897, the following further proceedings were had and appear of record in said cause, to wit :

(Trial Further Progressed.)

3695	Leo Rassieur,	
3696	Frederick Widmann,	
3697	German Savings Institution,	
3698	Edward Mallinckrodt,	
3699	Leo Rassieur, Trustee ;	
3700	Anna Jungenfeld,	
3701	Edmund Jungenfeld's Adm'r,	
3726	Jacob W. Skinkle, Use, &c., Plaintiffs,	} (Consolidated.)
	<i>vs.</i>	
	De La Vergne Refrigerating Machine Co.	
	<i>et al.</i> , Defendants.	

Now, at this day, come again said parties by their respective attorneys, and thereupon the trial of this cause progressed, but not being concluded at the hour of adjournment, it is ordered that further proceedings be continued until tomorrow morning.

And afterwards, to wit, on the 5th day of February, A. D. 1897, the following further proceedings were had and appear of record in said cause, to wit :

(Trial Further Progressed.)

3695	Leo Rassieur,	
3696	Frederick Widmann,	
3697	German Savings Institution,	
3698	Edward Mallinckrodt,	
3699	Leo Rassieur, Trustee;	
3700	Anna Jungenfeld,	
3701	Edmund Jungenfeld's Adm'r,	
3726	Jacob W. Skinkle, Use, &c., Plaintiffs,	} (Consolidated.)
	<i>vs.</i>	
	De La Vergne Refrigerating Machine Co.	}
	<i>et al.</i> , Defendants.	

Now, at this day come again said parties by their respective attorneys, and thereupon the trial of this cause progressed, but not being concluded at the hour of adjournment, it is ordered that further proceedings be continued until tomorrow morning.

And afterwards, to wit, on the 6th day of February, A. D. 1897, the following further proceedings were had and appear of record in said cause, to wit:

(Cause Submitted.)

3695	Leo Rassieur,	
3696	Frederick Widmann,	
3697	German Savings Institution,	
3698	Edw. Mallinckrodt,	
3699	Leo Rassieur, Trustee;	
3700	Anna Jungenfeld,	
3701	Edmund Jungenfeld's Adm'r,	
3726	Jacob W. Skinkle, Use, &c., Plaintiffs,	} (Consolidated.)
	<i>vs.</i>	
	De La Vergne Refrigerating Machine Co.	}
	<i>et al.</i> , Defendants.	

Now, at this day come again said parties by their respective attorneys, and thereupon the trial of this cause progressed, and being terminated, the same is by the court taken under advisement.

And afterwards, to wit, on the 27th day of February, A. D. 1897, the following further proceedings were had and appear of record in said cause, to wit:

33

(Judgment.)

3695	Leo Rassieur,	
3696	Frederick Widmann,	
3697	German Savings Institution,	
3698	Edward Mallinckrodt,	
3699	Leo Rassieur, Sole Surviving Trustee of Carl Jungensfeld ;	
3700	Anna Jungensfeld,	
3701	Leo S. Rassieur, Administrator <i>d. b. n. c. t. a.</i> of the Estate of Edmund Jungensfeld, Deceased ;	
3726	Jacob W. Skinkle, to the Use of Merchants' } National Bank of Chicago, Plaintiffs, }	
	<i>vs.</i>	
	The De La Vergne Refrigerating Machine Company and Wm. C. Richardson, Pub- } (Consolidated.) lic Administrator in Charge of the Es- tate of John C. De La Vergne, Deceased, }	
	Defendants.	

Now, in the above-entitled consolidated cause, come the several plaintiffs by their attorneys Rassieur & Schnurmacher, and also come the defendants The De La Vergne Refrigerating Machine Company, by Chas. H. Aldrich, Esq., and Frederick W. Lehmann, Esq., its attorneys, and the defendant Wm. C. Richardson, public administrator of the city of St. Louis, Missouri, and as such in charge of the estate of John C. De La Vergne, deceased, by his attorney Wm. W. Henderson, Esq., and the said consolidated cause and the several causes composing the same having been heretofore submitted to the court on the evidence and pleading a jury having been duly waived in writing, and the court being now fully advised in the premises, doth find the issues in said consolidated cause and in the said several causes in favor of the said several plaintiffs and against the said defendants and assesses the damages sustained by said several plaintiffs by reason of the said several causes of action sued upon in the said several causes at the respective sums set forth immediately following the names of said plaintiffs, to wit:

Leo Rassieur.....	\$25,583.33
Frederick Widmann.....	8,954.16
German Savings Institution....	3,197.91
Edward Mallinckrodt.....	28,781.24
Leo Rassieur, sole surviving trustee of Carl Jungensfeld..	8,954.16
Anna Jungensfeld.....	8,954.16
Leo S. Rassieur, administrator <i>d. b. n. c. t. a.</i> of the estate of Edmund Jungensfeld, deceased.....	11,512.50
Jacob W. Skinkle, to the use of Merchants' National Bank of Chicago.....	30,912.50

34 making the aggregate sum of one hundred and twenty-six thousand eight hundred and forty-nine dollars and ninety-six cents.

It is therefore considered by the court that the said several plaintiffs in said consolidated cause have and recover from the defendant The De La Vergne Refrigerating Machine Company, the said several amounts of damages assessed in their favor as aforesaid respectively, to wit:

Leo Rassieur.....	\$25,583.33
Frederick Widmann	8,954.16
German Savings Institution.....	3,197.91
Edward Mallinckrodt,...	28,781.24
Leo Rassieur, sole surviving trustee of Carl Jungensfeld..	8,954.16
Anna Jungensfeld.....	8,954.16
Leo S. Rassieur, administrator <i>d. b. n. c. t. a.</i> of the estate of Edmund Jungensfeld, deceased.....	11,512.50
Jacob W. Skinkle, to the use of Merchants' Na. Bank of Chicago.....	30,912.50

(making the aggregate sum of one hundred and twenty-six thousand eight hundred and forty-nine dollars and ninety-six cents), together with their costs and charges in this behalf by them respectively expended, and that each and every one of said plaintiffs have execution therefor.

It is further considered by the court that the said several plaintiffs in the said consolidated cause and in said several causes, have and recover out of the property of the said John C. De La Vergne, deceased, in the hands of said defendant Wm. C. Richardson, public administrator of the city of St. Louis, Missouri, the said several amounts of damages assessed in their favor as aforesaid respectively, and their costs and charges by them respectively expended, and that this judgment be certified to the probate court of the city of St. Louis, to be there proceeded with according to law. Finding of facts filed.

And afterwards, to wit: on the 4th day of March, A. D. 1897, the following further proceedings were had and appear of record in said cause, to wit:

35 (*Execution Stayed, &c.; Motion for a New Trial Filed by Defendants.*)

- 3695 Leo Rassieur,
 3696 Frederick Widmann,
 3697 German Savings Institution,
 3698 Edward Mallinckrodt,
 3699 Leo Rassieur, Sole Surviving Trustee of Carl Jungenfeld;
 3700 Anna Jungenfeld,
 3701 Leo S. Rassieur, Administrator *d. b. n. c. t. a.* of the Estate
 of Edmund Jungenfeld, Deceased;
 3726 Jacob W. Skinkle, to the Use of Mer-
 chants' National Bank of Chicago,
 Plaintiffs,

vs.

The De La Vergne Refrigerating Ma-
 chine Company and William C. Rich-
 ardson, Public Administrator in
 Charge of the Estate of John C. De La
 Vergne, Deceased, Defendants. } (Consolidated.)

On motion of defendants by attorney, it is ordered, that execu-
 tion upon the several judgments herein be stayed for the period of
 forty-two (42) days from and after the 27th day of February, A. D.
 1897, the day upon which the said judgments were entered. And
 it is further ordered, that the several defendants have forty-two (42)
 days from and after said last-mentioned date within which to file
 their several petitions for new trial.

Said defendants by attorneys in said consolidated cause thereupon
 file motion for new trial, and the court doth order that said motion
 and said cause be continued until the next term of court.

And afterwards, to wit, on the 23rd day of April, A. D. 1897, the
 following further proceedings were had and appear of record in
 said cause, to wit:

(*Motion for New Trial Overruled and Defendants Granted Thirty Days'
 Time to File Bill of Exceptions.*)

- 3695 Leo Rassieur,
 3696 Frederick Widmann,
 3697 German Savings Institution,
 3698 Edwin Mallinckrodt,
 3699 Leo Rassieur, Trustee;
 3700 Anna Jungenfeld,
 3701 Edward Jungenfeld's Adm'r,
 3726 Jacob W. Skinkle, Use, &c., Plaintiffs,

vs.

De La Vergne Refrigerating Machine } (Consolidated.)
 Co. et al., Defendants. }

36 The court having considered the motion for a new trial
 heretofore filed in this consolidated cause, it is
 Ordered that said motion for a new trial be overruled.

On motion of said defendants by their attorneys, the said defendants are granted thirty days' time within which to file their bill of exceptions herein.

And afterwards, to wit, on the 10th day of May, A. D. 1897, the following further proceedings were had and appear of record in said cause, as of May 6, 1897, to wit:

(Bill of Exceptions Filed, &c.)

Ordered that the following be entered as of May 6, 1897, to wit:

3695	Leo Rassieur,	
3696	Frederick Widmann,	
3697	German Savings Institution,	
3698	Edward Mallinckrodt,	
3699	Leo Rassieur, trustee ;	
3700	Anna Jungenfeld,	
3701	Edmund Jungenfeld's Administrator,	
3726	Jacob W. Skinkle, Use, &c., Plaintiffs,	} (Consolidated.)
	<i>vs.</i>	
	De La Vergne Refrigerating Machine	
	Co. <i>et al.</i> , Defendants.	

Now comes defendant The De La Vergne Refrigerating Machine Co. by its attorney and presents a bill of exceptions, which is allowed, signed, sealed and filed and made a part of the record herein; and said defendant also files an assignment of errors and petition for writ of error to remove this cause to the United States circuit court of appeals, eighth circuit and a notification and request to Wm. C. Richardson, administrator, &c., defendant, to join in petition for writ of error; and said defendant De La Vergne Refrigerating Machine Co. presents a citation, citing and admonishing the said plaintiffs to be and appear at said circuit court of appeals, within sixty days from this date, which said writ of error is allowed and said citation signed by the judge.

Said bill of exceptions is in words and figures as follows, to wit:

37

(Bill of Exceptions.)

In the Circuit Court of the United States within and for the Eastern Division of the Eastern District of Missouri.

GERMAN SAVINGS INSTITUTION, Plaintiff,

vs.

THE DE LA VERGNE REFRIGERATING MACHINE COMPANY and
W. C. Richardson, Public Administrator, Representing and in
Charge of the Estate of John C. De La Vergne, Deceased, De-
fendants.

LEO RASSIEUR

vs.

SAME DEFENDANTS.

JOHN W. SKINKLE, to the Use of Merchants' National Bank of
Chicago,

vs.

SAME DEFENDANTS.

EDWARD MALLINCKRODT

vs.

SAME DEFENDANTS.

ANNA JUNGENFELD

vs.

SAME DEFENDANTS.

LEO S. RASSIEUR, Adm'r *d. b. n. c. t. a.* of the Estate of Edmund
Jungenfeld, Deceased; Leo Rassieur, Sole Surviving Trustee of
Carl Jungenfeld,

vs.

SAME DEFENDANTS.

FREDERICK WIDMAN

vs.

SAME DEFENDANTS.

(Consolidated causes.)

Be it remembered that on this 2nd day of February, A. D. 1897, the several causes hereinabove named and entitled came on to be heard; and, by consent of all the parties, the said several causes were consolidated in order to be tried as one; that the consolidated causes coming on further to be heard on said 2nd day of February, 1897, the defendant, The De La Vergne Refrigerating Machine Company, filed a motion to dismiss the cause as to the defendant, William C. Richardson, public administrator, and an affidavit in support of same, which said motion and affidavit are in words and figures as follows, to wit:

In the Circuit Court of the United States for the Eastern Division
of the Eastern District of Missouri.

GERMAN SAVINGS INSTITUTION, Plaintiff,

vs.

DE LA VERGNE REFRIGERATING COMPANY and JOHN C. DE LA
Vergne, Defendants.

LEO RASSIEUR

vs.

SAME DEFENDANTS.

JACOB W. SKINKLE

vs.

SAME DEFENDANTS.

EDWARD MALLINCKRODT

vs.

SAME DEFENDANTS.

ANNIE JUNGENSELD

vs.

SAME DEFENDANTS.

LEO RASSIEUR, Ex'rs, &c.,

vs.

SAME DEFENDANTS.

P. J. LINGENFELDER and LEO RASSIEUR, Trustees, &c.,

vs.

SAME DEFENDANTS.

Motion to dismiss causes as to W. C. Richardson, who assumes to
appear in his capacity as public administrator, representing the
estate of John C. De La Vergne, deceased.

Now comes the defendant, The De La Vergne Refrigerating Com-
pany, and shows to the court that since this suit was brought and
since the issues have been joined herein the defendant, John C. De
La Vergne has died; that said John C. De La Vergne was at the
time of his death a resident and citizen of the city, county and
State of New York; that he left no estate in the State of Missouri
and left no property of any kind in said State; that the property
belonging to him was situated in the State of New York, and that
he left a will which has been duly probated by the probate court of
the city of New York, and by the said will appointed Jacob Ruppert
and Catherine A. De La Vergne as his executors and they have been
properly qualified, and are acting as such; that the said executors have
not authorized any appearance on their behalf, nor on behalf
39 of the estate that they represent, and the said appearance of
the public administrator herein is not by their request nor

in their interest, nor to protect any rights or interests they have, or that their said estate has in this litigation, but on the contrary such appearance has been made for the sole purpose of aiding the plaintiffs in these cases in the prosecution of these suits; that the public administrator in this proceeding in these cases is acting under the suggestion and advice of the plaintiffs herein, and he is proceeding herein for the sole purpose of aiding them to procure a judgment in these cases; that said John C. De La Vergne left no property of any kind whatsoever in the State of Missouri, nor is any property of any kind belonging to said John C. De La Vergne come into the possession of the said public administrator, and there is not existing in the State of Missouri any estate whatsoever of the said John C. De La Vergne to be administered upon.

CHARLES NAGEL,
BOYLE, PRIEST AND LEHMANN AND
C. H. ALDRICH,
*Attorneys for the De La Vergne Refrigerating
Machine Company.*

(Affidavit.)

STATE OF MISSOURI, }
City of St. Louis, } ss:

H. W. Guernsey, of lawful age, being first duly sworn, deposes and says that he is the agent and representative of the De La Vergne Refrigerating Machine Company; that he was acquainted with John C. De La Vergne during his lifetime; that he was familiar with the property and affairs of the said John C. De La Vergne; that he has read the foregoing motion and the statements therein contained; that the said De La Vergne was a resident and citizen of the city, county and State of New York; that he died in said city, leaving a will, and that by said will Jacob Rapport and Catharine A. De La Vergne were appointed executors; that said will has been probated and the said Jacob Rapport and Catharine A. De La Vergne have qualified as executors and are acting as such; that said John C. De La Vergne left no property in the State of Missouri, and that there is no estate of the said John C. De La Vergne existing in the State of Missouri to be administered upon, and upon information and belief states that the sole purpose of the appearance of said Wm. C. Richardson in these cases is to aid the plaintiffs in obtaining judgment.

H. W. GUERNSEY.

Subscribed and sworn to before me this 2nd day of February, 1897.

JAS. R. GRAY,
U. S. Commissioner.

40 Which said motion was submitted to and considered by the court and by the court was overruled. To which ruling of the court, the defendant, The De La Vergne Refrigerating Machine Company, then and there duly excepted.

And thereafter on the said 2nd day of February, A. D. 1897, the consolidated cause came on for trial and the parties thereto filed their stipulation in writing waiving a jury therein, and agreeing that the said cause should be submitted to the court.

And thereafter on the said 2nd day of February, A. D. 1897, the said cause came on to be heard; and the plaintiffs, to maintain the issues on their part, offered in evidence a paper entitled "An agreed statement of facts," signed by the defendants, as an admission of the defendants, heretofore and on October 3rd, 1893 filed in this case, which is as follows:

Agreed Statement of Facts.

In the above-entitled causes it is hereby stipulated and agreed, by and between the several plaintiffs to said several causes, and the several defendants therein, that the said causes shall be taken by the court as submitted upon the pleadings and the following statement of facts:

That the defendant, The De La Vergne Refrigerating Machine Company is, and at all the times covered by the pleadings, was, a corporation organized under the laws of the State of New York, with its chief office in the city of New York, in said State, and the defendant John C. De La Vergne is, and at the time when these suits were brought was, a resident of the city of New York in said State. That on the 14th day of October, 1890, the Consolidated Ice Machine Company was a corporation organized under the laws of the State of Illinois, and was engaged in the manufacture and sale of refrigerating and ice-making machines. That Exhibit One is the original certificate of papers of its incorporation, and correctly sets forth the subscriptions for stock which were made and reported to the secretary of state before said certificate of organization was issued. That on said 14th day of October, 1890, said Consolidated Ice Machine Company made a general assignment for the benefit of its creditors to one R. E. Jenkins, and that at the time of said assignment the capital stock of said Consolidated Ice Machine Company consisted of two thousand shares of the par value of one hundred dollars each, of which said two thousand shares, five hundred subscribed and held by W. B. Bushnell had been forfeited to the company for non-payment of assessments; the five hundred subscribed by W. B. Bushnell as treasury stock had been subscribed by him to sell to workmen in the Consolidated Ice Machine Company, but were never sold or paid for, and that no certificate had ever
41 been issued for them by said corporation, and that the remaining one thousand shares at said time were fully paid and appeared on the books of the company, and certificates for them were issued, transferred and held as follows:

(1.) Twenty-five shares represented by certificate No. 17 of said Consolidated Ice Machine Company, issued to Leo Rassieur and P. J. Lingenfelder, executors, and appearing in their names upon the books of the company, which certificate had been indorsed by

them and thereupon delivered to said German Savings Institution as collateral security.

(2.) Leo Rassieur, 200 shares; represented by certificates Nos. 5, 6, 7 and 8, each for fifty shares, issued to said Leo Rassieur, and appearing in his name upon the books.

(3.) Anna, or Annie Jungenfeld, 70 shares; represented by certificate number 12, and appearing in her name upon the books.

(4.) Jacob W. Skinkle, 250 shares; these shares appeared in his name upon the books of the company; the certificate for them he had theretofore delivered as collateral security for an indebtedness which he owed to the Merchants' national bank, and said bank had delivered said certificate to him with power to make the contract hereinafter referred to in his name, said shares being represented by certificate No. 4.

(5.) Edward Mallinckrodt, 225 shares; represented by certificate No. 16, and appearing in his name on the books.

(6.) Ninety shares appearing on the books of the company in the name of E. Jungenfeld and represented by certificate No. 15; Leo Rassieur and P. J. Lingenfelder were at said time the duly appointed and qualified executors of the estate of E. Jungenfeld, deceased.

(7.) Leo Rassieur and P. J. Lingenfelder, trustees of Carl Jungenfeld, 70 shares; represented by certificate No. 13, and appearing in their names upon the books of the company.

(8.) Frederick Widman, 70 shares; represented by certificate No. 18, and appearing in his name upon the books of the company.

That the assets assigned by said Consolidated Ice Machine Company to said Jenkins consisted in the main of a plant for the manufacture of its machines, located in the city of Chicago, Illinois, of patent rights, outstanding accounts and the good will of its business, in which it had been engaged constantly for about six years. That at said time and for some time prior thereto, the De La Vergne Refrigerating Machine Company was also engaged in the manufacture and sale of refrigerating and ice making machines, and defendant, John C. De La Vergne, was the principal stockholder and the president thereof.

That on the 16th day of April, 1891, the defendants, De La Vergne and The De La Vergne Refrigerating Machine Company and said Consolidated Ice Machine Company, and said several plaintiffs did enter into a contract in writing, of which the following is a copy:

The Contract.

"This agreement made and entered into this sixteenth (16th) day of April, 1891, by and between the Consolidated Ice Machine Company, a corporation of the city of Chicago, and State of Illinois, party of the first part, Jacob W. Skinkle, Edward Mallinckrodt, Leo Rassieur, Annie Jungenfeld, Frederick Widman, acting in their own right, P. J. Lingenfelder and Leo Rassieur, as executors of the estate of Edmund Jungenfeld, deceased, and as trustees of Carl Jungenfeld, a minor, and the German Savings Institution, a

banking corporation of the State of Missouri, who are the owners of the issued stock of said The Consolidated Ice Machine Company, and control the unissued stock thereof by virtue of such ownership, parties of the second part, the De La Vergne Refrigerating Machine Company, a corporation of the city of New York, in the State of New York, party of the third part, and John C. De La Vergne, of the city of New York, aforesaid, party of the fourth part.

Witnesseth: Whereas the said party of the first part on the fourteenth (14th) day of October, 1890, made an assignment for the benefit of its creditors to R. E. Jenkins, who is now engaged in winding up its affairs, and whereas further the assets of said party of the first part, in the opinion of the said parties of the second part, exceed in value the liabilities thereof, and consist in part of the good will of said party of the first part (which good will has been established by six years of successful manufacture of refrigerating and ice-making machines, together with an expenditure of the earnings from such manufacture), and *whereas the said party of the third part is willing to acquire such right as the said parties of the first and second parts can assign in and to the said assets*, subject to the obligations of the said party of the first part; and whereas further, under the laws of the State of Illinois, under which the assignment aforesaid has been made, the said party of the first part is not entitled to the possession of its assets in the hands of the assignee aforesaid, until its obligations have been complied with and discharged, or the majority in number and amount of its creditors have signified their willingness to the court having jurisdiction of

43 said assignment, and an order has been obtained therefrom to have the said assets transferred and delivered by said Jenkins to the said party of the first part, or its assigns, and whereas further, the said party of the third part is now incorporated under the laws of the State of New York with a full-paid capital stock of only three hundred and fifty thousand (350,000) dollars, divided into three thousand five hundred (3,500) shares of one hundred (100) dollars each par value and its net assets, in the opinion of the said party of the fourth part are fully worth the sum of one million four hundred thousand (1,400,000) dollars; and whereas the said party of the third part and its stockholders are now considering a plan of so increasing the stock of said company as will enable said company to have a full-paid capital of two million (2,000,000) dollars, one million four hundred thousand (1,400,000) dollars, of which stock is to be issued to its present stockholders, 100,000 to the stockholders of the Consolidated Ice Machine Company under the terms of this agreement, and the remaining five hundred thousand (500,000) dollars of stock to be disposed of in the market at not less than par, and the proceeds of such at par to become part and parcel of the assets of said De La Vergne Refrigerating Machine Company, the said party of the third part, such plan of increasing the stock of said party of the third part, to be carried out either by an increase of stock, under the laws of the State of New York, or by the organization of a new company, under the laws of the State of New Jersey, or some other State, for the

purpose of the purchasing of the assets and good will of the party of the third part.

Now, therefore, in view of the premises, and for and in consideration of the mutual advantages to be gained by the execution of this contract:

First. The said party of the first part and the said parties of the second part, agree and covenant to and with the said parties of the third and fourth parts to bargain, sell and convey, **and by these presents do bargain, sell and convey unto the said party of the third part, all their right, title and interest in and to the assets of the said party of the first part,** subject to the payment of its obligations, and subject to the custody thereof in the legal custodian, R. E. Jenkins, assignee, as aforesaid.

Second. The said parties of the third and fourth parts covenant and agree to and with the said parties of the first and second parts to issue unto the said parties of the second part full-paid stock in the said party of the third part to the amount of one hundred thousand dollars (\$100,000.00), and which stock so to be issued shall be issued unto the said parties respectively in the following proportions, to wit:

44 To J. W. Skinkle.....	50
To Edward Mallinckrodt.....	200
	45
To Leo Rassieur.....	200
To Annie Jungenfeld.....	40
To German Savings Institution.....	200
To Frederick Widman..	14
To J. J. Lingensfelder and Leo Rassieur, as executors as aforesaid	200
	18
To P. J. Lingensfelder and Leo Rassieur, as trustees as aforesaid.....	200
	14
	200

Third. That said parties of the third and fourth parts covenant and agree that the net assets of the said party of the third part are fully worth one million four hundred thousand (1,400,000) dollars, not including the assets and rights purchased under this agreement, and that said stock in the De La Vergne Refrigerating Machine Company, to be issued under this agreement to said parties of the second part, shall represent not less than one-fifteenth ($\frac{1}{15}$ th) part of said assets, and that no additional stock be issued in the said company, or in the new company to be organized as hereinbefore set forth beyond one million five hundred thousand (1,500,000) dollars par value, without actual value in the full amount being first received by said company, and the said parties of the third and fourth parts covenant and agree to and with the said parties of the second part, that said parties of the second part shall have the privilege of examining said assets of the party of the third part until the first day of August, 1891, for the purpose of verifying the statement made herein concerning the value of said assets, and that if it be

ascertained that the actual value of said assets is not in accordance with the covenant hereinbefore set forth, then the said parties of the second part shall have the privilege and right of demanding that said stock so to be issued to them be made to accord with the covenant aforesaid, regarding value, and the said parties of the third and fourth parts covenant and agree to make said stock represent the value aforesaid; and it is further covenanted by and between the parties, that any examination made in good faith by the purchasers of at least one hundred thousand dollars (\$100,000.00) additional stock in said party of the third part, or in the new company to be organized for the purpose of acquiring the assets of said party of the third part, shall be conclusive evidence upon the parties hereto as regards the net value of said assets, providing an opportunity be given to said parties of the second part of being represented and taking part in the making of any such examination.

45 Fourth. For the purpose of placing the said party of the third part in complete control of the assets of the party of the first part, subject to the legal rights of said assignee, and the creditors of said party of the first part, the said parties of the second part agree within ten (10) days from the date hereof to assign to said party of the fourth part, for the benefit of the said party of the third part, all the stock of the said party of the first part, which has been issued and which they guarantee has been paid in full, and within sixty (60) days thereafter the said parties of the third part and fourth parts agree to issue and deliver to said parties of the second part in the proportions aforementioned the stock of the said party of the third part to the amount of one hundred thousand (100,000) dollars.

Fifth. The said parties of the second part covenant and agree to and with said parties of the third and fourth parts to accept in lieu of the said stock in the said party of the third part, or of any successor to the said party of the third part, the sum of one hundred thousand (100,000) dollars in cash, at the option of said party of the fourth part.

Sixth. It is clearly understood by all the parties hereto that the said party of the third part, by the acceptance of the above conveyance, does not make itself liable for any of the obligations and liabilities of the said party of the first part.

Seventh. The said parties of the second part covenant and agree to and with the said parties of the third and fourth parts for a period of ten (10) years from the date hereof not to enter into or become connected with the sale of refrigerating or ice-making machines, directly or indirectly, within the United States of North America, excepting the State of Montana, and excepting also the business of the said party of the third part, or of such company as becomes its successor and purchaser of all its rights.

In witness whereof, the said parties of the second and fourth parts have hereunto set their hands and seals, and the said parties
46 of the first and third parts have caused their respective presi-

dents to affix their names on the day and date first hereinbefore written.

(Signed) THE CONSOLIDATED ICE MA-
CHINE CO.,
By J. W. SKINKLE, *Pres.* [SEAL.]
(Signed) JACOB W. SKINKLE. [SEAL.]
(Signed) EDWARD MALLINCKRODT. [SEAL.]
(Signed) LEO RASSIEUR. [SEAL.]
(Signed) ANNIE JUNGENSELD, [SEAL.]
By LEO RASSIEUR, *Her Att'y-in-fact.*
(Signed) FRED WIDMAN, [SEAL.]
By LEO RASSIEUR, *His Att'y.*
(Signed) P. J. LINGENFELDER AND [SEAL.]
LEO RASSIEUR, [SEAL.]
Executors of the Estate of Ed. Jungensfeld, Deceased.
(Signed) P. J. LINGENFELDER AND [SEAL.]
LEO RASSIEUR,
Trustees of Carl Jungensfeld, Minor.
(Signed) GERMAN SAVINGS INSTITU- [SEAL.]
TION,
By LEO RASSIEUR, *Its Att'y.*
(Signed) THE DE LA VERGNE RE- [SEAL.]
FRIGERATING MACHINE CO.,
By JOHN C. DE LA VERGNE, *Pres.*
JOHN C. DE LA VERGNE. [SEAL.]

I consent to the execution of above contract and ratify the same.
(Signed) J. KOENIGSBERG.

I consent to the execution of above contract and ratify same.
(Signed) ANNIE JUNGENSELD,
By H. A. HAEUSSLER, *Att'y.*

I consent to the execution of above contract and ratify same.
(Signed) F. WIDMAN.

Herewith I ratify the execution of foregoing agreement by my co-executor and cotrustee, and adopt the same as my act as trustee and executor, and consent to such sale and contract.

P. J. LINGENFELDER,
Executor of E. Jungensfeld's Estate.
P. J. LINGENFELDER,
Trustee for Carl Jungensfeld, a Minor.

The undersigned, German Savings Institution, herewith ratifies the execution of foregoing agreement and sale by Leo Rassieur, its attorney, and consents to said sale.

GERMAN SAVINGS INSTITUTION,
By RICHARD HOSPES, *Cashier."*

47 It is further agreed that subsequently, to wit: on the 23d day of April, 1891, Leo Rassieur addressed a letter to Joseph Koenigsberg, a copy of which is as follows:

"APRIL 23D, 1891.

Mr. Joseph Koenigsberg, No. 213 E. 54th street, New York city, N. Y.

DEAR SIR: Enclosed please find certificates of Consolidated I. M. Co., as follows:

No. 17 to Leo Rassieur and P. J. Lingenfelder.....	25 shares
" 6 " Leo Rassieur	50 "
" 8 " Leo Rassieur	50 "
" 7 " Leo Rassieur	50 "
" 5 " Leo Rassieur	50 "
" 12 " Anna Jungensfeld	70 "
" 4 " Jacob W. Skinkle.....	250 "
" 16 " Edward Mallinckrodt	225 "
" 15 " E. Jungensfeld estate.....	90 "
" 13 " L. R. and P. J. L. for Carl Jungensfeld.....	70 "
" 18 " F. Widman	70 "
	<hr/>
	1,000 "

which please hand on Saturday, April 25th, to Mr. De La Vergne in person, this being the last day.

Yours very truly,

LEO RASSIEUR."

That in this letter were inclosed certificates of stock of the Consolidated Ice Machine Company, with certain indorsements thereon, the originals of which are hereto attached and marked Exhibits 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, and 12.

That the signature to the transfer of certificate No. 4 is that of J. W. Skinkle, plaintiff in case No. 3726; that the signature to transfers of certificates Nos. 5, 6, 7, and 8, is that of Leo Rassieur, plaintiff in case No. 3695; that the signature to transfer of certificate No. 12 is that of Anna Jungensfeld, plaintiff in case No. 3700; that the signatures to transfers of certificate- No. 13, 15 and 17, are the handwriting of Leo Rassieur alone; that the signature to the transfer of said certificate No. 16 is that of Edw. Mallinckrodt, plaintiff in case No. 3698; that the signature to transfer of certificate No. 18 is that of Fred Widman, plaintiff in case No. 3696.

That on the 25th day of April, 1891, said letter from Leo Rassieur to Joseph Koenigsberg of 23d day of April, 1891, together with said enclosures was received by said Koenigsberg; and that on said same 25th day of April, 1891, said Koenigsberg handed all said certificates of stock in the Consolidated Ice Machine Company indorsed as aforesaid, to defendant John C. De La Vergne; and
48 that said John C. De La Vergne thereupon made upon the margin of said letter of the 23d day of April, 1891, the following indorsement:

"4, 25, '91.

Received the above-described stock from the hand of J. Koenigsberg.

JOHN C. DE LA VERGNE."

That on the 27th day of April, 1891, Ashbell P. Fitch, attorney for defendant John C. De La Vergne, wrote and mailed to Leo Rassieur the following letter:

"APRIL 27TH, 1891.

Leo Rassieur, southwest corner of Fourth and Market Sts., St. Louis, Mo.

DEAR SIR: Mr. De La Vergne has submitted to me the transfer of certificate No. 17 of 25 shares of the Consolidated Ice Machine Company, issued to you and Mr. Lingenfelder as executors of Edmund Jungenfeld's estate, dated September 11th, 1889.

These shares are transferred by the signature of P. J. Lingenfelder and Leo Rassieur, executors of Ed. Jungenfeld, deceased, which of course would be regular. In the body of the assignment, however, are the words 'to John C. De La Vergne by direction of the German Savings Institution, owner hereof.'

It seems to me that the statement that the German Savings Institution is owner of the shares of stock is notice to Mr. De La Vergne of their ownership in such form as would bind him. It seems to me further that if the German Savings Institution are the owners of this certificate, and Mr. De La Vergne has been notified thereof, that the signatures of the executors of the Jungenfeld estate is insufficient to transfer the certificate to Mr. De La Vergne, unless he holds some ratification of the transfer by the German Savings Institution.

I suppose there would be no difficulty in our getting some memorandum, signed in the proper form by the institution, to the effect that they recognize and approve the transfer of this certificate to Mr. De La Vergne.

There are also several other matters to which I would like to call your attention in this connection.

The signature of the holders of the various certificates to the transfer of the same are not witnessed except in two cases: Mr. Skinkle's certificate No. 4, for 250 shares, is witnessed in lead pencil, and the Anna Jungenfeld certificate No. 12 for 70 shares, is witnessed by Marguerite Von Jungenfeld.

The stock of the Jungenfeld estate is transferred to P. J. Lingenfelder and yourself, as executors, and I assume that the names of both executors were signed by you, probably under some authority which does not appear on the face of the paper. This is also the case in regard to certificate No. 13 for 70 shares, held by Mr. Lingenfelder and yourself, as trustees for Carl Lingenfelder (*sic*).

There is also a clause printed on the back of this stock in such a way as to be notice to us, which reads as follows:

The holder of any stock, who desires to sell the same or any part thereof, shall be required to tender such stock to the company, and to the stockholders thereof, at par for a period of sixty days, and shall only have the right to sell the same in open market after the company and its stockholders have declined to purchase the same.

I desire to suggest to you that the different questions raised by

the facts which are mentioned above might be covered by some agreement signed by all the stockholders reciting that such a tender had been made to them and to the company, and declined, or that with knowledge of their rights in the premises, the different stockholders had waived this requirement and that this agreement might recite the sale of this stock to Mr. De La Vergne and be signed by Mr. Lingenfelder in his capacity as executor and in his capacity as trustee, and that it might also contain some recital and signature which would cover the question of the witnessing of the different transfers.

These are suggestions as to how this can be covered. Of course you will understand that in one way or other it will be necessary for me to have these points satisfactorily covered. This seems to me to be doubly necessary because it appears on the face of the papers that there is an estate and trust involving minor children, and some of the stock is in the name of a lady, and you know how necessary it is under such circumstances to be careful to get the papers right while the people are alive and while the transaction is known to us all.

Yours sincerely,
(Signed)

ASHBELL P. FITCH."

Which letter was received by said Leo Rassieur on the 29th day of April, 1891. That on said 29th day of April, 1891, Leo Rassieur replied to said A. P. Fitch in the following letter:

"ST. LOUIS, April 29th, 1891.

A. P. Fitch, Esq., att'y-at-law, 93 Nassau street, New York city, N. Y.

DEAR SIR: In reply to your favor of the 29th inst. which came to hand today, I write to inform you that I shall comply with the request made therein by you.

The fact that all the stockholders have transferred to Mr. De La Vergne under an agreement joined in by the company, seemed to me sufficient to be construed as a waiver of that portion of
50 our by-laws which requires that the stock should first be offered to the company and then to the stockholders thereof, but in order that every question may be fully disposed of to your entire satisfaction, I will have signed such an agreement as you suggest and have it signed by all stockholders, providing you will prepare same and send it on.

Miss Anna Jungensfeld is not in this country and hence such signature as may be required of her will have to be made by her attorney-in-fact, Herman A. Hauessler, Esq.

With a view to covering the two points suggested by you concerning the German Savings Institution stock and that which is held by Dr. Lingenfelder and myself as executors and trustees, I herewith enclose assignments made by them duly witnessed.

Yours very truly,
(Signed)

LEO RASSIEUR.

P. S.—I also enclose my copy of original agreement duly ratified, upon receipt of which please send me Mr. De La Vergne's copy.

L. R."

And that in said letter were enclosed three powers of attorney, all signed by the persons or parties whose names are attached thereto, and in language as follows:

Know all men by these presents, that we, P. J. Lingenfelder and Leo Rassieur, as executors of the estate of Edmund Jungenfeld, deceased, of the city of St. Louis, State of Missouri, do hereby constitute and appoint ——— our true and lawful attorney for us and in our names and behalf to sell, assign and transfer to John C. De La Vergne, Esq., our ninety (90) shares to us belonging in the capital stock of the Consolidated Ice Machine Company, evidenced by certificate No. 15 of said company, and for that purpose to make all necessary acts of assignment and transfer.

In witness whereof, we have hereunto set out hands and seals this twenty-third day of April, 1891.

(Signed) P. J. LINGENFELDER, [SEAL.]

Executor Ed. Jungenfeld, Deceased.

(Signed) LEO RASSIEUR, [SEAL.]

Executor Ed. Jungenfeld, Deceased.

Executed in presence of—

(Signed) HUGO MUENCH.

2. Know all men by these presents, that the German Savings Institution, a banking corporation of the city of St. Louis, State of Missouri, does hereby constitute and appoint Hon. Ashbell P. Fitch its true and lawful attorney for it and in its name and behalf, to sell, assign and transfer unto John C. De La Vergne, Esq., its twenty-five shares (25) to it belonging in the capital stock of the Consolidated Ice Machine Company, evidenced by certificate No. 17

51 of said company, transferred by P. J. Lingenfelder and Leo Rassieur, executors (in whose name the same appeared on the books), by its directions to said John C. De La Vergne, and for that purpose to make all necessary acts of assignment and transfer.

In witness whereof, the said German Savings Institution has hereunto caused its cashier to affix his hand and its corporate seal this twenty-third day of April, 1891.

(Signed) GERMAN SAVINGS INSTITUTION.
[SEAL.] RICHARD HOSPES, *Cashier.*

Executed in presence of—
———

3. Know all men by these presents, that we, P. J. Lingenfelder and Leo Rassieur, as trustees of Carl Jungenfeld, a minor, under the will of Edm. Jungenfeld, deceased, and with full power of disposition over the assets in our hands, of the city of St. Louis, State of Missouri, do hereby constitute and appoint ——— our true and lawful attorney for us and in our names and behalf to sell, assign and transfer unto John C. De La Vergne, Esq., our seventy (70) shares to us belonging, in the capital stock of the Consolidated Ice Machine Company, evidenced by certificate No. 13 of said com.

pany, and for that purpose to make all necessary acts of assignment and transfer.

In witness whereof, we have hereunto set our hands and seals this twenty-third day of April, 1891.

(Signed) P. J. LINGENFELDER, [SEAL.]
Trustee Carl Jungensfeld, a Minor.

(Signed) LEO RASSIEUR, [SEAL.]
Trustee Carl Jungensfeld, a Minor.

Executed in presence of—

(Signed) HUGO MUENCH.

But that said powers, though purporting to be executed on the 23d day of April, 1891, were not actually executed until after the 25th day of April, 1891.

That in the month of July, and later, demand was made by Leo Rassieur on John C. De La Vergne, for the stock provided for in the agreement of April 16th, 1891, and that after said several demands Ashbell P. Fitch, attorney for John C. De La Vergne, wrote and mailed to Leo Rassieur on September 12th, 1891, the following letter:

SEPTEMBER 12TH, 1891.

Leo Rassieur, Esq.

DEAR SIR: I am just out again after a long illness which has prevented my attending to any business for many weeks, and am handed now some letters of yours to Mr. John C. De La Vergne, dated in July and August, in regard to the matters pending between you and others and Mr. De La Vergne, of which I have charge for him.

These letters request the delivery of certain stock of the De La Vergne Company under a contract made April 16th, 1891, between the Consolidated Ice Machine Company and others, and Mr. De La Vergne.

On examining the contract and correspondence, it seems to me that under the contract you were bound within ten days from the date of the contract to fully and properly assign to Mr. De La Vergne all of the stock of the Consolidated Ice Machine Company which had been issued, and it seems to me further that it is clearly shown by my letter of April 27th, 1891, to you and your reply to me dated April 29th, 1891, and by other evidence that this was not done in time in accordance with the contract.

I am also informed that litigation, which has during my illness arisen in the State of Illinois in regard to the charter of the Consolidated Company, would affect the right of the stockholders or of the company to carry into effect such a contract as that of the 16th of April, 1891, even if the stockholders and the company were not in default under the contract, as it seems to be they plainly are.

I am also informed that there is some question in litigation and otherwise affecting the ownership of the stock of the Consolidated Company.

Pending further information on these points, I have still in my possession the papers which you have sent me, and sent to Mr. De La Vergne, which of course, if my views as above expressed are correct, I am ready to pass over to *whoever is legally entitled to the custody of the same, which is a question which I am not willing personally to decide.*

I shall be obliged if you will write to me and explain how far my conclusions above mentioned seem to you to be well founded, and also what, from your point of view, the present legal status of the Consolidated Company now is.

I am informed that the attorney general of the State of Illinois has taken action which must result in the dissolution of the corporation.

I am not *not* yet able to take up my regular work, and am going to Sharon Springs for a couple of weeks, but any letters sent to my office by you will be forwarded to me.

I regret to learn from your correspondence submitted to me that you have also been ill, and hope that you have fully recovered.

Yours sincerely,

(Signed)

ASHBELL P. FITCH.

Which letter was received by Leo Rassieur on September 16th, 1891.

53 It is further agreed that all the stock which Leo Rassieur and P. J. Lingenfelder attempted to transfer, either as trustees or as executors, excepting the 25 shares represented by certificate No. 17, belonged to said E. Jungenfeld at the time of his death and was derived from the estate of Edmund Jungenfeld, deceased, and that said 25 shares represented by said certificate No. 17 was acquired by Leo Rassieur and P. J. Lingenfelder, executors, in payment of a debt owing by Joseph Koenigsberg to said E. Jungenfeld at the time of his death, and that the authority of Leo Rassieur and P. J. Lingenfelder, if they had such authority either as executors of the estate of Edmund Jungenfeld, deceased, or as trustees for Carl Jungenfeld, to sell, exchange or transfer shares of stock in the Consolidated Ice Machine Company, is to be found in the last will and testament of Edmund Jungenfeld, deceased, which is as follows:

Know all men by these presents, that I, the undersigned Edmund Jungenfeld, being of sound and disposing mind and memory, do make, declare and publish the following as and for my last will and testament, to wit:

Firstly. It is my wish and will that my mother shall act as the guardian of the person and estate of my daughter Anna, who is now in her care.

Secondly. It is also my wish and will that my friends Louis P. Wilkins and Leo Rassieur shall be appointed as guardians of the person of my son Carl during his minority.

Thirdly. I desire my estate both real and personal to be divided into three equal shares or parts, and I give, bequeath and devise one undivided third thereof or one share to my daughter Anna, one share to my friends P. J. Lingenfelder and Leo Rassieur, as trustees

of my son Carl, and the remaining share to Sophia Sander, who has for many years faithfully served me and my family and whose services I desire to acknowledge in a substantial manner.

To have and to hold the said respective shares unto the said Anna, my daughter, and to the said Sophia Sander and unto their heirs and assigns forever, and unto the said Lingenfelder and Rassieur as trustees for my son Carl, and unto their assigns and successors in the trust hereby created, under the terms and conditions hereinafter set forth.

The said trustees shall retain control of, manage and invest said trust fund until my said son arrives at the age of twenty-eight (28) years when he shall be entitled to the same. My said trustees shall

54 be required to provide him with the means to continue his education, and also provide him with all necessities; they shall furthermore make him such further allowances and payments as they may deem for his benefit and advantage, having due regard to the use to which the same are to be put and the capacity of my son to take care of such means as may be entrusted to him by my said trustees. My son shall at all times be privileged to require that annual accounts of his estate be rendered him, and in default of such accounting, the circuit court of St. Louis city is empowered upon his petition or the petition of any friend to remove my said trustees and appoint one or more trustees in their places.

My said trustees shall have full power to convey, bargain and sell or lease any and all real estate that they possess and hold as part of said trust fund, and also have power to invest any and all funds in their charge as they may deem proper and profitable for their said trust estate.

Fourthly. I hereby nominate and appoint as executors of this will my said friends, P. J. Lingenfelder and Leo Rassieur, and also request that no bond be required of them in the discharge of their said duties. I give my executors full power to sell, convey and transfer any part or portion of my estate, if they deem it for the advantage of those interested as legatees. I also authorize and empower them to make any payments that I may owe on stock held by me in any incorporated company, particularly, however, the unpaid portion of my stock in the Consolidated Ice Machine Company of Chicago.

In witness whereof, I have hereunto set my hand at St. Louis city this nineteenth day of December, A. D. 1884.

EDMUND JUNGENFELD.

Signed, declared and published as and for his last will and testament by the above-subscribed Edmund Jungenfeld, in our presence, who at his request, in his presence and in the presence of each other, have hereunto subscribed their names as witnesses thereof.

P. J. LINGENFELDER.
MARY JOESEL.
WILHELM LEWITS.
LEO RASSIEUR.

Which said will had been duly probated in the probate court, city of St. Louis, Mo., and under which will said Leo Rassieur and P. J. Lingensfelder duly qualified as executors.

It is further agreed that neither of the plaintiffs mentioned in this agreement ever furnished or offered to furnish defendants, or either of them, certificates of stock in the Consolidated Ice Machine
55 Company issued in the name of John C. De La Vergne; and that no effort of any kind was ever made to deliver the stock in the Consolidated Ice Machine Company as contemplated in the said agreement of April 16th, 1891, except as hereinabove stated. That no order of court was ever made to authorize Leo Rassieur and P. J. Lingensfelder, or either of them, either as executors — as trustees, to make the sale or transfer of stocks contemplated by the said contract of April 16th, 1891. That when Ashbell P. Fitch wrote to Leo Rassieur on the 27th day of April, 1891, and thereafter, and all the times heretofore herein mentioned, said Leo Rassieur was the duly authorized agent and attorney of the parties plaintiff herein.

That the provision printed on the certificates of stock hereto attached as Exhibits 2 to 12 inclusive, as part of the by-laws of said Consolidated Ice Machine Company was in fact a part of said by-laws.

It is further agreed that defendants did not within sixty days after the said 25th day of April, 1891, nor did they at any time before, or since, issue or deliver to any of the plaintiffs any stock whatever in the defendant company, nor in any other company, nor have they at any time paid any of the plaintiffs any cash money in lieu of stock, although, as is also admitted to be a fact, plaintiffs have demanded of the defendants the one or the other.

It is further agreed that on the 9th day of October, 1891, an agreement was entered into between creditors of the Consolidated Ice Machine Company, whose claims amounted to over three hundred thousand dollars, looking to a purchase of a part of the assigned property of the said Consolidated Ice Machine Company including its plant and machinery. That of the parties plaintiff herein Fred. Widman, J. W. Skinkle, Leo Rassieur and German Savings Institution were at the time creditors of said company, and as such joined in said agreement. That in pursuance of said agreement two trustees named therein did purchase and acquire for said creditors said entire plant and machinery assigned by said Consolidated Ice Machine Company for about seventy thousand dollars, and that said trustees thereafter sold said plant and machinery for the benefit of all said creditors named in said agreement for about \$73,000; but that said plant and machinery were never operated by said trustees, or by said creditors or any of them.

It is further agreed that either party may read from the Revised Statutes of Illinois, 1891 (Hurd's), or from any other authentic revision or publication, in evidence in these causes, such portions of the statutes and laws of the State of Illinois as he
56 deems relevant to the issues, subject to objection for relevancy, and the matter so read shall be treated as if set forth in this agreement of fact.

To this offer of the foregoing statement, the defendant, The De La Vergne Refrigerating Machine Company, objected on the ground that it was not material or competent, being an agreement entered into in reference to a former trial of the cause, and not competent and not binding upon the parties with reference to this trial; and the said defendant further objected to the said agreed statement of facts as evidence herein in so far as the same included the contract set out in the said agreed statement for the reason that the said contract, being the contract of April 16th, 1891, shows a joint liability, while the actions herein were severally brought; and for the further reason that there is no evidence that the contract was ever executed by the De La Vergne Refrigerating Machine Company, and because the contract was as to said company *ultra vires*, and because the contract was beyond the corporate power of the Consolidated Ice Machine Company, and because the said contract was against the public policy of the State of New York and also against the public policy of the State of Illinois. Which objection was overruled by the court; to which ruling of the court, the defendant, The De La Vergne Refrigerating Machine Company, then and there duly excepted.

The plaintiff to further maintain the issues on its part offered in evidence the commission and certificate of election and bond of William C. Richardson as public administrator for the city of St. Louis, together with the oath of office indorsed thereon, which said commission and oath and the filing and recording memoranda thereon and bond are in words and figures as follows, to wit:

The State of Missouri to all who shall see these presents, Greeting:

Know ye that, it having been certified to me that William C. Richardson was, on the eighth day of November, eighteen hundred and ninety-two, duly elected public administrator within and for the city of St. Louis.

Now, therefore, in the name and on behalf of the State of Missouri, I, David R. Francis, governor thereof, do hereby commission him public administrator aforesaid, for the term of four years, as specified by law, and authorize and empower him to discharge the duties of said office according to law.

57 In testimony whereof, I hereunto set my hand and cause to be fixed the great seal of the State of Missouri. Done at the city of Jefferson, this seventeenth day of November in the year of our Lord one thousand eight hundred and ninety-two.

By the governor:

[SEAL.]

DAVID R. FRANCIS.

A. A. LESUEUR,

Secretary of State.

On the back of the above commission is indorsed the following oath and certificate:

STATE OF MISSOURI, }
 City of St. Louis, } ss:

I, William C. Richardson, do solemnly swear that I will support the Constitution of the United States and the constitution of the State of Missouri, and that I will faithfully demean myself in the office of public administrator, within and for the city of St. Louis.

WM. C. RICHARDSON.

Subscribed and sworn to before me the undersigned clerk of the probate court within and for said county of St. Louis this 12th day of December, A. D. eighteen hundred and ninety two.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at office in the city of St. Louis the date aforesaid.

[SEAL.]

W. E. WAGNER, *Clerk.*

On the back of said commission is also endorsed the following memorandum by the clerk:

Filed December 12, 1892, and duly recorded in Miscellaneous Record "C," page 91. W. E. Wagner, clerk, by B. W. Melvaine, D. C.

(Bond.)

Know all men by these presents: that I, William C. Richardson, as principal, and we, The American Surety Company of New York as securities, are held and firmly bound unto the State of Missouri in the full and just sum of one hundred thousand dollars (\$100,000.00) to the payment whereof well and truly to be made we bind ourselves, our heirs, executors, administrators and assigns, jointly and severally firmly by these presents.

Scaled with our seals and signed by us this 9th day of December, 1892.

The condition of the above bond is this: That whereas the above-bounden William C. Richardson was on the first Tuesday 58 after the first Monday of November (being the eighth day of said month) duly elected public administrator within and for the city of St. Louis in the State of Missouri, for the term of four years, and until his successor be qualified in pursuance of the statutes of said State of Missouri in such case made and provided.

Now if the said William C. Richardson shall faithfully discharge all the duties of said office of public administrator of the city of St. Louis aforesaid, during his continuance in office in pursuance of the statutes of the State of Missouri and the decrees or orders of a court of competent jurisdiction, then the above obligation shall be null and void, otherwise to remain in full force and effect.

WM. C. RICHARDSON. [SEAL.]

AMERICAN SURETY CO. OF

NEW YORK, [SEAL.]

By CHAS. H. TURNER, [SEAL.]

Resident Vice-President.

Attest: M. STODDARD,

Res't Ass't Secretary.

Recorded December 12, 1892.

B. W. McILVAINE,
Deputy Clerk.

On the back of the above bond is indorsed the following:

Approved Dec'r 12, 1892. 65. p. 688. Recorded in Miscellaneous Record C, page 92. Dec. 30, '93. Reapproved. 68, p. 393. Filed Dec'r 12, 1892. W. E. Wagner, clerk. Recorded in Record of Administrators' Bonds B. 11, p. 336.

The following is a true copy of the record of the approval of the foregoing bond by the probate court of the city of St. Louis, as offered in evidence, appearing in Record Book 65, of said court, page 688, to wit:

STATE OF MISSOURI, }
City of St. Louis, } ss:

At a term of the probate court, begun and held at the city of St. Louis, within and for said city of St. Louis, in the State of Missouri, on the second Monday, being the twelfth day of December, A. D. 1892, are present,

Hon. J. Gabriel Woerner, judge of said court, William E. Wagner, clerk of said court, and Patrick M. Staed, sheriff of the city of St. Louis.

Be it remembered, that on the twelfth day of December, 1892, it being one of the days of the December term of said court
59 for the year 1892, the following among other proceedings, were had in and by said court, to wit:

Commission Presented. Bond Ordered Filed and Approved.

In the Matter of WILLIAM C. RICHARDSON.

Now at this day comes William C. Richardson and presents to the court his commission as public administrator within and for the city of St. Louis, for a term of four years, issued by the governor of the State of Missouri, bearing date the seventeenth day of November, A. D. 1892, together with his official oath thereon indorsed, which is ordered to be filed and recorded.

It is thereupon ordered by the court, that said William C. Richardson, as such public administrator, do enter into bond to the State of Missouri, in the sum of one hundred thousand dollars (\$100,000.00), conditioned and payable as required by law.

And now again comes said William C. Richardson, and in pursuance of the foregoing order, tenders his bond, as such public administrator, in the sum of one hundred thousand (100,000) dollars, conditioned according to law, with the American Surety Company of New York as his surety, which bond is by the court approved and ordered to be filed and recorded.

To which evidence the defendant, 'The De La Vergne Refrigerating Machine Company, objected on the ground that it is immaterial

and irrelevant in that the administrator has no status as a party in this cause. Which objection was by the court overruled; to which ruling of the court the defendant's counsel then and there duly excepted.

And to further maintain the issues on their part, the plaintiffs offered in evidence the notice given by said William C. Richardson, as public administrator, on the 13th day of March, 1896, to the effect that he had taken charge of the estate of John C. De La Vergne, deceased, which said notice is in words and figures as follows, to wit:

STATE OF MISSOURI, }
City of St. Louis, } ss:

To the Hon. Leo Rassieur, judge of the probate court of the city of St. Louis:

Notice is hereby given to creditors and all other persons interested in the estate of John C. De La Vergne, late of the city of St. Louis, deceased, that I, the undersigned, public administrator, within and for the city aforesaid, have this day taken charge
60 of said estate for the purpose of administering the same.

Given under my hand this 13th day of May, A. D. 1896.

WM. C. RICHARDSON,
Public Administrator.

The above notice bears the following indorsement on the back thereof:

Recorded in Book of Pub. Adm'r Notices, on page 418. Filed May 13th, 1896. Jos. A. Wherry, clerk, by J. W. Gutting, D. C.

To which notice the defendant, The De La Vergne Refrigerating Machine Company, objected on the ground that the same is immaterial and incompetent, because the said public administrator had no status as a party in this cause, and further, because the statute assuming to authorize the public administrator to act as such in this cause is unconstitutional; which objection was by the court overruled; to which ruling of the court, the defendant, The De La Vergne Refrigerating Machine Company, then and there duly excepted.

The foregoing is all the testimony offered on behalf of the plaintiff.

The defendant, The De La Vergne Refrigerating Machine Company, to maintain the issues on its part offered in evidence the depositions of Otto C. Butz, Clarence A. Knight, R. E. Jenkins, E. J. Thomas, and Wm. G. Adams, taken in the city of Chicago, beginning November 5th, 1896, before E. B. Sherman, master in chancery, of the United States court for the northern district of Illinois, at his office in the city of Chicago, and the taking of said depositions being completed on the 5th day of November, A. D. 1896, together with all the exhibits to the said depositions from one to

twelve inclusive, and all stipulations of parties contained in the record of the said depositions as the said depositions, exhibits and stipulations now are on file in this cause.

In the Circuit Court of the United States for the Eastern District of Missouri.

GERMAN SAVINGS INSTITUTION	}	Consolidated Causes.
v.		
DE LA VERGNE REFRIGERATING MACHINE Company <i>et al.</i>		

NOVEMBER 5, 1896.

It is stipulated and agreed by and between the parties hereto, the plaintiff in the above-entitled cause being represented by Mr. Leo Rassieur, and the defendant, De La Vergne Refrigerating Machine Company by Mr. Charles H. Aldrich and Mr. F. W. Lehman, that depositions of witnesses to be used in the above-entitled cause may be taken before E. B. Sherman, master in chancery of the United States circuit court for the northern district of Illinois, at his office in the city of Chicago, beginning on this 5th day of November, A. D. 1896, to be continued from day to day until completed, each party having the right to call witnesses and examine them, the examination to be taken in shorthand and when transcribed the transcript to be filed in the cause and to be read in evidence in like manner as if the witnesses were examined in open court.

The depositions taken under this stipulation, if competent, material and relevant, which objections may be made and are to be passed upon by the court when these depositions are offered in evidence, may be read in evidence in each and all of the cases pending in the United States circuit court for the eastern district of Missouri, eastern division, against the defendants in the above-entitled cause.

And it is further stipulated that all of the said cases pending against the above-named defendants in said circuit court of the United States for the eastern district of Missouri, shall, for the purposes of trial, be heard together as one cause.

Mr. LEHMANN: Counsel for defendants now offer in evidence certified transcript of proceedings in the case of The People of the State of Illinois v. The Consolidated Ice Machine Company, general number 92682, being transcript of proceedings in the cause heretofore pending in the circuit court of Cook county, as Defendants' Exhibit Number 1.

Mr. RASSIEUR: Counsel for plaintiff objects to the introduction of the record aforesaid, because the testimony is immaterial, irrelevant and incompetent.

It is stipulated that objections to testimony may be made at the hearing of the cause on all grounds except as to the form of the question.

Mr. LEHMANN: We offer in evidence the bids received for the property of the Consolidated Ice Machine Company, as shown by the transcript of the record which we file, and ask that it may be marked as Defendants' Exhibit Number 2.

Mr. RASSIEUR: It is stipulated that no objection is made to the transcript on the ground of certification; objection as to competency or materiality, however, is reserved.

Mr. ALDRICH: We also offer the record showing the order of the county court of Cook county on the 14th day of December, 1891, selling certain property therein referred to to Clarence A. Knight and Otto C. Butz as trustees, which is marked Defendants' Exhibit Number 3.

Mr. RASSIEUR: Same stipulation and same reservation.

Mr. ALDRICH: Defendants also offer in evidence the order of the 4th day of May, 1891, of the county court of Cook county, Illinois, in the matter of the Consolidated Ice Machine Company, as Defendants' Exhibit Number 4.

Mr. RASSIEUR: The same stipulation as to certification is made as in Exhibit Number 2, and the same reservation as to competency and materiality.

Mr. ALDRICH: Counsel for defendants ask counsel for plaintiff if he has in his possession or subject to his control a copy of the contract of October 9, 1891, referred to in the agreed statement of facts heretofore filed in this cause, and if he has such copy we respectfully request him to produce the same, in order that we may offer the same in evidence.

Mr. RASSIEUR: I can't say whether I have that contract. If I had been asked twelve hours ago I could have given a definite answer and would have gladly produced it. My recollection is that I have at least something that indicated what that contract was, either my rough notes or a copy of the original contract, and shall be glad to produce it when I have ascertained where it is. I may be able to answer that question this afternoon.

Mr. ALDRICH: Counsel for defendants request the plaintiff's counsel to search for the contract and if he can, to produce the same.

Counsel for defendants also ask counsel for plaintiff whether he has the original of the bill of sale made by R. E. Jenkins, assignee of the Consolidated Ice Machine Company, to Clarence A. Knight and Otto C. Butz, as trustees, for certain creditors of the Consolidated Ice Machine Company.

Mr. RASSIEUR: I haven't it in my possession; don't recollect that I ever saw it.

Mr. ALDRICH:

Q. And also whether he has the original or a copy of the agreement made on the 6th day of January, 1892, between Clarence A. Knight and Otto C. Butz, trustees, as aforesaid, and John Featherstone's Sons; there is a copy.

Mr. RASSIEUR: I don't know anything about those papers, never

63 saw them, so I wouldn't pass upon these papers, don't know anything about them, except that I learned there was a purchase and learned there was a sale.

Mr. ALDRICH: At the taking of this testimony I will state that I appear only for the De La Vergne Refrigerating Company; that since the death of Mr. John C. De La Vergne, one of the defendants, I have not received authority to appear for his executors, or the representatives of his estate.

OTTO C. BUTZ, a witness called on behalf of defendants, being first duly sworn, testified as follows:

Direct examination.

By Mr. ALDRICH:

Q. You may state your name.

A. Otto C. Butz.

Mr. RASSIEUR: I object to the evidence being taken in this case, on the ground that the facts upon which this case is to be tried have been agreed upon and put into the form of an agreed statement of facts.

Q. Your residence?

A. 464 Belden avenue, Chicago, Illinois.

Q. Your profession?

A. I am a lawyer.

Q. How long have you resided in Chicago?

A. Since my birth.

Mr. RASSIEUR: I desire to make this objection to all this testimony that may be taken, without reiteration of the objection to each question.

Mr. ALDRICH: It is so understood.

Q. In connection with the insolvency proceedings of the Consolidated Ice Machine Company, you appear, with Mr. Clarence A. Knight, to have been the purchaser of a certain portion of the assets, as trustee for certain persons; am I correct?

Mr. RASSIEUR: I desire to enter an objection to this testimony, on the ground that it is immaterial, irrelevant and incompetent.

A. You are.

Q. For what persons, corporations, etc., were you trustee?

Mr. RASSIEUR: Same objection.

A. I was attorney for the largest number of the persons I represented, and I wish here to take advantage of that fact in objecting to answer the question, on the ground that they are all communications between those clients and myself and are privileged communications.

Q. I am not calling for any communications between yourself and clients, but I am calling for the facts, as to what clients or persons you represented in that trust.

64 Mr. RASSIEUR: Same objection.

A. It seems to me that that is a distinction without a difference; the disclosing of the clients is a disclosure of the communications by which I was appointed the attorney of these people. I desire the court to rule on that question, and will abide the ruling of the court.

Mr. ALDRICH: I think the distinction is obvious, if the master please, that we are entitled to know what clients he represented. I do not ask for any communications between himself and clients with reference to the terms upon which he represented them, or the proceedings of representation.

The MASTER: I think the question should be answered, Mr. Butz.

A. There were quite a number of them, I don't remember the names of all of them.

Q. Have you a list?

Mr. RASSIEUR: Same objection.

A. I have.

Q. Please produce it.

A. I have a list in connection with a copy of the agreement which I was called upon to produce here this morning, and to the introduction of which evidence I wish to make the same objection I made to your previous question.

Mr. ALDRICH: I ask the master's ruling.

The MASTER: On that I have already ruled.

A. I would have to take the names from the agreement; you want all the names?

Q. All the names that are parties to that trust.

A. John Featherstone's Sons; J. W. Skinkle; Cleveland City Forge & Iron Company; Kelly, Maus & Company; Crane Elevator Company; William McKay; Morris machine works; Pittsburg Steel Castings Company; Chicago Foundry Company; Vierling, McDowell & Company; Fred B. Forsyth; Shook & Anderson Manufacturing Company; Duquesne Forge Company; Yale & Towne Manufacturing Company; Samuel J. Little; William A. Chapman & Company; Malcolm McIntyre; V. H. Becker; James P. Marsh & Company; James Curran; Vacuum Oil Company; S. P. Tainter; E. McNeal; Loomis & Gillespie; Weir & Craig Manufacturing Company; Harry Skinkle; J. M. Westerlin; Taylor Brothers Company; Starkweather & Williams; George Roberts; Peter Wilkes; Belden Machine Company; Jones & Laughlin; Weaver Getz & Company;

William Ganshaw ; James Slabbey ; E. T. Skinkle ; Jonathan Featherstone's Sons as assignee of one-half of Crane Company's claim ; Louis Schlossstein, as assignee of one-half of claim of Crane Company ; there are a lot more, but that is all I have. These are the only papers I have.

Q. I want the whole list, Mr. Butz.

A. That is all the list I have ; I looked up among my papers—I keep these in my safety-deposit box, and that is all I found there, I thought I had the others.

MR. ALDRICH : I will ask Mr. Knight if he has such list, and if so to produce it so that I can proceed with the examination of this witness.

Q. Here is a copy of what purports to be your final report, and there is a list of claimants signing the trust agreement of October 9th, with the amount of their respective claims. (Showing witness paper.) Will you give the others ?

A. Leo Rassieur ; Rassieur & Tiffany ; Rassieur & Schnurmacher ; the Home Bank of New York ; Leo Rassieur indorses ; German Savings Institution, of St. Louis ; Minna Fenerbacher ; Louis Schlossstein ; F. Wideman ; W. C. Kueffner ; the National Ammonia Company ; Charles Rietz & Brothers' Lumber & Salt Company ; A. C. Wagner ; D. W. McKindley ; I. Blumenthal ; E. W. Blatchford & Company.

Q. I infer from the list of claimants, or list of persons whom you represented, and whose names you have given to the court, that the trust was created by an agreement dated October 9, 1891 ?

MR. RASSIEUR : Same objection.

A. It was.

Q. In the agreed statement of facts which has been referred to by Judge Rassieur, it is said that the trust was so created and you purchased thereunder ; I will ask you to produce the written contract creating the trust, that a copy may be made and put into the deposition.

MR. RASSIEUR : I make the same objection as before, to the testimony.

A. I have not the complete agreement, I have only a copy of an agreement, signed by a portion of the parties.

Q. Have you a copy of the full written part, except the signatures ?

A. I have ; I think this is a correct copy that was signed by the parties.

Q. Please produce it.

A. I wish to make the same objection.

MR. RASSIEUR : I object to the testimony.

66 A. These are agreements that are the property of my clients, that they have placed in trust with me, and my clients received no notice of the fact that I am required to produce them.

Mr. ALDRICH: I submit that no notice to clients is necessary, and that parties litigant are entitled, where persons purchased property that is sold under insolvency proceedings and it becomes important in the settlement of their interests to know the terms of the trust; and the peculiar relevancy of this is shown from the fact that under the terms of the contract sued upon in the cause in which we are taking the testimony, the parties agreed that they would turn over the assets to the alleged vendee company, defendant, and that they wouldn't engage in the business directly or indirectly, of manufacturing or selling ice machines. I propose to show, by the terms of this contract, that notwithstanding the agreement which is sued upon, these parties did engage in the business of manufacturing and selling ice machines, and that they took steps also to prevent turning over these assets to the De La Vergne Company, and I expect to show it by this contract, and it is plainly relevant for that purpose.

Mr. BUTZ: It seems to me that if such a contract should be desired to be proved, it should be proved through the clients who signed it, they are not in the position of holding a contract as attorneys. This is a communication, an agreement, which I hold for my clients; if they desire to prove the existence of the contract, let them prove it in the proper way, through the clients who signed it.

Mr. RASSIEUR: I desire to state here that so far as the copy is concerned taking the place of the original I make no objection to that being done; my objection is made on the ground of the immateriality, incompetency of the testimony.

Mr. ALDRICH: I desire further to add, that we are calling for this as a paper establishing a trust, and not a communication; it is not within the rule of communications at all; it is a paper establishing a trust and showing how and upon what terms property is disposed of.

Mr. BUTZ: Which has been entrusted to me by the clients and has been sent to me.

Mr. ALDRICH: It would be as reasonable for the Illinois trust & savings bank to refuse to produce a trust deed on the ground that they hold it as trustee, as it is for Mr. Butz to refuse.

67 Mr. BUTZ: The Illinois trust and savings bank would hardly occupy the position of an attorney towards a client, it would be occupying merely the position of a stranger holding a document in trust without the additional responsibility of being attorney and acting in an official capacity as attorney.

Mr. ALDRICH: I am calling upon you as trustee, and I submit a trustee can't escape disclosures because he is accidentally attorney also.

The MASTER: The master has no pleadings before him and of

course, cannot be well advised as to the matters in controversy; he will overrule the objection, but with leave to counsel to bring this matter to the attention of the court and move to strike out this testimony, so that it can possibly do (not) harm if it should be inadvisedly admitted.

A. I have a copy of the agreement which is signed by a portion of the parties that entered into the agreement which, under the ruling of the court a copy should be made, and I desire to have the agreement returned to me. There is with this agreement a power of attorney, which authorizes Messrs. Knight and Butz to represent a portion of the creditors that signed the agreement, and which is also produced.

Mr. ALDRICH: I ask that a copy of this agreement be attached to the witness' deposition, also the power of attorney, as Defendants' Exhibit 5. The signatures, inasmuch as they have been given, may be omitted. It is as follows:

This agreement, made and entered into this ninth day of October, A. D. 1891, by and between the undersigned creditors of the Consolidated Ice Machine Company, a corporation organized under the laws of the State of Illinois, which has made an assignment to Robert E. Jenkins, assignee, and whose assets are now being administered in the county court of Cook county, in the State of Illinois, witnesseth as follows:

Whereas, by the inventory and report of the assignee of said estate, it appears that the plant formerly used by said insolvent is valued at \$130,000.00, and

Whereas, the only bid that has been received for said plant is the sum of \$66,000 00, and

Whereas, the claims due said insolvent are substantially all in litigation and it will take a long period of time to rescue the said assets and divide the same among the creditors under the present proceedings, and

Whereas, it is necessary for the purpose of obtaining as much for the creditors of said insolvent as it is possible to obtain that some concert of action shall be taken on behalf of the creditors who desire to join herein, so that the parties joining herein will obtain a larger sum on their respective demands than would be the result if said insolvent proceedings were permitted to be carried on.

Now therefore, in consideration of the agreements herein contained, made by the undersigned, one with the other, and the further consideration of the sum of one dollar cash in hand paid by each of the undersigned parties to the other parties hereto, the receipt whereof is hereby acknowledged and confessed, the undersigned creditors of said The Consolidated Ice Machine Company, covenant and agree as follows:

First. We do hereby assign and set over all our respective claims and demands against said insolvent to Clarence A. Knight and Otto

C. Butz, as trustees, and to their successors and assigns for the purposes hereinafter set forth, and will make any other or further conveyances of said claims and demands that may be necessary to effectuate and carry out the purposes of this agreement, hereby giving unto said trustees jointly, but not severally, full power and authority to take any action that they may deem necessary or advisable for the purpose of realizing as large a sum as possible upon our respective claims and demands hereby giving them, said trustees, full power and authority to use our names and act in our place and stead in all matters pertaining to said claims and demands, with as full force and power as we might or could do if personally present, in acting thereunder, and hereby ratifying and confirming all that our said trustees may do in the premises.

Second. The amount of each claim shall be the amount as proved up and filed with the assignee of said insolvent, with interest to the date hereof, upon all notes included in said claim, at 6% per annum. Provided, that if any claims shall be put in suit and judgment obtained on said claims then the amount of said claims shall be that as fixed by said judgment, and provided, that any claim to which exceptions have been filed in the county court, shall be passed upon and allowed by said trustees on the basis of this clause.

Third. Said trustees shall also have power to raise money for the purpose of purchasing claims against said insolvent, and may make such purchases in case any claimant shall decline to become a party to this agreement and for such purpose shall have power to use any funds, to which the several claimants will be entitled under any dividend to be paid by the assignee of said insolvent, or by said trustees.

69 Fourth. Said trustees shall also have power to bid in any or all of said assets of the said insolvent corporation in their own names as trustees for the benefit of the parties signing this agreement, and in case the said trustees purchase said assets then all of said assets so purchased shall be held by said trustees for the benefit of the parties who may sign this agreement, and said trustees shall have power to sell or dispose of said assets in such manner as they may deem advisable for the purpose of realizing on the same and said trustees shall have full power and authority to compromise and settle, as in their judgment they may deem advisable, any claim which they may purchase as aforesaid, or they may, if they see fit, have power and authority to transfer said assets to any corporation that may be organized for the purpose of using said assets for the benefit of the parties hereto.

Fifth. In case the said trustees shall deem it advisable to form a corporation under the laws of the State of Illinois to carry on said ice-machine manufacturing business for the purpose of realizing on said assets, so purchased of said assignee of said insolvent, then said trustees shall have the power and authority to transfer all or a part of the assets so received by them as aforesaid to said corporation. Provided, all the stock in said corporation shall be held by said trustees for the use and benefit of all the parties to this agreement, and as soon as the claims of the parties to this agreement shall be

paid in full then said trustees shall divide all the stock of said corporation held by them as such trustees *pro rata* (along) all the parties to this agreement, according to the amount of their respective demands. The shares of stock of said corporation shall be of the par value of fifty dollars (\$50.00) per share, and each claimant shall have one share of stock for every \$100.00 of his claim.

And provided, that if within one year from the date hereof the said trustees shall not have paid in full all the claimants who sign this agreement, then the said trustees shall distribute all of said remaining assets, including stock in said company, as provided aforesaid, and in any event shall close said trade within one year, and in case no corporation is formed, but said trustees collect in said assets, then said collections so made shall be distributed to the parties to this agreement as soon as said collections shall amount to 10% from time to time, of the amount of the respective claimants herein, reserving, however, to said trustees the right to retain a fund to the amount of 10% of the claimants who sign this agreement, so that at no time shall said trustees hold in their hands more than the sum of 10% of the total amount of claims herein signed.

70 Sixth. In case said trustees shall form a corporation then the capital stock of said corporation shall not exceed 50% of the total amount of the claims herein signed, and when said corporation so formed shall have collected any sum over \$50,000.00 in cash they shall declare a dividend of all such excess, unless 75% of the total amount of claims herein signed shall consent in writing to the use of said excess for the purpose of carrying on and conducting said business of said corporation.

Seventh. It is further agreed that in case of the death or resignation or refusal to act of Clarence A. Knight, one of the trustees herein named, then John Featherstone's Sons shall have the designation of the successor to the said trustee and in case of the death, resignation or refusal to act of Otto C. Butz, trustee, then Leo Ras-sieur, of St. Louis, shall have the designation of the successor to said Otto C. Butz.

Eighth. In case this agreement is not signed by claimants to the amount of three hundred thousand dollars (\$300,000) against said insolvent estate, then this agreement shall be considered as null and void and without effect, and for the purpose of determining said amount and that purpose only, the claim of John Featherstone's Sons shall be considered as \$90,000.00, leaving \$210,000.00 of creditors to sign outside of John Featherstone's Sons.

Ninth. The said trustees shall be entitled to retain from the moneys collected by them out of the assets of said insolvent under this agreement reasonable compensation for their services in carrying out this trust from time to time as they may see fit, and shall have power to employ all such agents or employes as may be necessary to successfully carry out the purpose of this agreement. The purposes of this agreement being to realize from said assets as much money as may be possible, under all the circumstances, for the benefit of the parties hereto, but said trustees shall be liable only for

damages resulting from their negligence and not for losses occurring on account of an error of judgment on their part.

Tenth. Nothing herein contained shall be held to release or discharge any collateral or other security any claimant may hold who signs this agreement, but said claimant shall have the right to pursue and realize from said collateral the same as though this agreement had not been made, but the amount so realized from said collateral shall be deducted from the amount of said claimant's interest herein, and any indorser who pays any claim against said insolvent, may become party hereto for such amount so paid.

71 Eleventh. If the said Leo Rassieur and Jacob W. Skinkle, Frederick Wideman and Joseph Koenigsberg sign this agreement and thereby agree to aid and do aid in collecting said assets which may be purchased from said assignee in a manner satisfactory to said trustees, then in consideration of such agreement of such services and of the sum of one dollar to the undersigned (to) them in hand paid, the receipt whereof is hereby acknowledged, the undersigned creditors covenant and agree to release and discharge the said Skinkle, Rassieur, Wideman and Koenigsberg from all alleged liability, by reason of any alleged assenting on their part to the creation of indebtedness by said insolvent corporation in excess of its capital stock, and from all alleged liability as stockholders of said insolvent or any claim against them as alleged copartners, but if this agreement is not signed, as provided in the eighth clause, then this clause to be held null and void.

In witness whereof, the parties hereto have hereunto set their hands and seals, together with the amount of their claims, the day and year first above written.

Power of Attorney.

Know all men by these presents: that we, the undersigned, have made, constituted and appointed, and by these presents (to) make, constitute and appoint Knight & Butz, of Chicago, Illinois, our attorneys to act for us and in our name, place and stead to take such action or proceedings as they may deem advisable for the purpose of collecting and receiving the amount of our claim against the Consolidated Ice Machine Company, a corporation organized under the laws of the State of Illinois, giving and granting unto our said attorneys irrevocably full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises as fully and to all intents and purposes as we might or could do if personally present at the doing thereof, hereby ratifying and confirming all that our said attorneys shall lawfully do or cause to be done by virtue hereof, giving and granting unto our said attorneys power to assign and transfer our claim against the Consolidated Ice Machine Company or take such other steps that may be necessary in their judgment to collect and receive as soon as possible the amount of our said claim.

In testimony whereof, we have hereunto set our hands and seals this 9th day of Oct., A. D. 1891.

	J. W. SKINKLE.	[SEAL.]
	E. T. SKINKLE.	[SEAL.]
	E. McNEAL.	[SEAL.]
	S. B. TAINTER.	[SEAL.]
	MALCOLM McINTYRE.	[SEAL.]
	JAMES CURRAN.	[SEAL.]
	VIERLING, McDOWELL & CO.,	
By	LOUIS VIERLING, <i>Sec'y.</i>	[SEAL.]
	WEIR & CRAIG MFG. CO.,	
	JOHN A. KLEY, <i>President.</i>	[SEAL.]
	LOOMIS & GILLESPIE.	[SEAL.]
	F. B. FORSYTHE,	
P'r	E. T. SKINKLE.	[SEAL.]
	HARRY SKINKLE.	[SEAL.]
	J. M. WESTERLIN.	[SEAL.]
	WM. McKAY.	[SEAL.]
	JONES & LAUGHLIN.	
	J. M. LAIM.	
	— BARKER.	[SEAL.]
	V. H. BECKER.	[SEAL.]
	LOUIS SLABBY.	[SEAL.]
	CHICAGO FOUNDRY CO.,	
By	W. W. FLINN, <i>Pres't.</i>	[SEAL.]
	JAS. P. MARSH CO.	[SEAL.]

Q. I understand, Mr. Butz, that this agreement was signed by the persons whose names you have read into the record?

A. Of course I cannot tell whether the other copy of the agreement which was signed by those parties whose names do not appear on this copy, is an identical copy of this one.

Q. It is, so far as you know?

A. So far as I know, it is.

Q. And you understood that the trust was an equal and like trust for all the persons interested did you not?

A. I did. Let the document speak for itself.

Q. I ask that question in view of your statement that you couldn't say that it is identical. It was identical in substance, was it not?

A. I think it was.

Mr. RASSIEUR: I make the same objection to this testimony that has been made before, that it is incompetent, irrelevant, and immaterial.

Q. Upon the purchase of these assets by Mr. Knight and yourself, Mr. Butz, what did you do with them?

Mr. RASSIEUR: Same objection to the question.

A. I wish to make the same objection.

73 Mr. ALDRICH: It may be understood that that objection is in all the way through.

A. We purchased the factory and sold it.

Q. How long did you continue to hold or own the factory?

A. I don't remember the exact time, it was not for very long.

Q. I hand you what purports to be the final report made by yourself and Mr. Knight, and ask you if it is a true copy of such report?

Mr. RASSIEUR: I desire to make the same objection to all this testimony.

Mr. ALDRICH: It may be understood that it is in to all, without repetition, if that is satisfactory.

Mr. RASSIEUR: It is perfectly satisfactory.

A. I think it is.

Mr. ALDRICH: I offer a copy of the report in evidence and ask that it be marked Defendants' Exhibit 6, which is as follows:

To — — —:

Final report of Clarence A. Knight and Otto C. Butz, as trustees of certain creditors of the Consolidated Ice Machine Company, under agreement dated October 9th, 1891.

Condition of Estate at Assumption of Trust.

When the trustees were appointed, the assignee held barely sufficient money to pay a dividend of twenty per cent., and the unpaid balances on contracts due the company amounted to in the neighborhood of five hundred thousand dollars.

The trust agreement contemplated the purchase by the trustees of the plant of the consolidated company, in order to prevent the loss that might accrue to the estate if the same were controlled by hostile hands, and in the hope that the company's good will might be preserved to the creditors joining in the agreement. These hopes were not realized, owing to the difficulty in making collections of the unpaid balances due the company, early enough to justify the trustees in organizing the corporation and continuing the business, as provided for in the trust agreement. Rather than continue holding the plant at a constant expense of rent, watchman, telephone service and insurance, the undersigned deemed it advisable

74 to sell the plant, which they succeeded in doing, finally, at a trifling loss to the creditors. The plant was purchased by the trustees for the sum of sixty-nine thousand seven hundred and fifty dollars, and the same was sold to John Featherstone's Sons for the same amount.

Service of Trustees.

After completing the purchase of the plant, the trustees went East to buy claims and endeavor to make settlements for claims

due the bankrupt estate, and later, in March, they again visited New York, Philadelphia, Washington and Trenton. They succeeded in purchasing, at prices ranging from forty to fifty-five per cent. of the face value, claims aggregating the sum of eighty-two thousand six hundred and eighty-one $\frac{32}{100}$ dollars. This involved personally meeting a large number of persons in New York, Philadelphia, Washington, Chester and Trenton, and correspondence with claimants in other States, and the expenditure of a great deal of time and energy.

When they reached the East, they found that for some months all steps looking to a settlement of the claims due the company had been abandoned as practically useless, and, although the representatives of the assignee had not been remiss in endeavoring to effect settlements, they had, by reason of their previous efforts in this direction, been placed in a position where all further advances from their side would be construed into a surrender of the company's rights. The trustees, being unfettered by former entanglements and promises, were thereby enabled to discuss anew, propositions looking to an abandonment of litigation which was pending in all claims, and, with the aid of the assignee's attorneys, which was cheerfully given, succeeded in their first trip in making a compromise with the Consumers' Hygienic Ice Company, of New York, and the Consumers' Ice Manufacturing Company of Philadelphia. The former paid forty-one thousand (41,000) dollars on a total indebtedness of fifty-four thousand dollars, and the latter paid fourteen thousand five hundred (14,500) dollars on account of twenty-one thousand dollars claimed to be due. In both instances, the harsh and exacting provisions of the contracts agreed to be complied with by the consolidated company were obstacles to be overcome, and made these settlements eminently satisfactory.

A determined effort was made to settle the amount due by the Trenton Company, and two special trips to Trenton to examine the plant and confer with Governor Abbott, and consult with the directors and Mr. Beasley, associate counsel of the Trenton Company, were believed useful. At one time the trustees had hopes they would succeed, but finally became convinced no arrangement could be made outside of court.

75 The New York Steam Company's claim was to be settled for thirty thousand dollars, but the parties in the end withdrew their proposition. Numerous conferences were had with the Philadelphia Warehousing Company, which finally resulted in their paying the sum of seventy thousand five hundred (70,500) dollars to the assignee, or almost the entire claim. These efforts involved a study of the contracts in each case, and required the trustees to make themselves familiar with all objections raised to the machines furnished and the history of their erection.

On their second visit, the trustees ascertained that the Knowles Steam Pump Company and William Schwenker, the former with a claim of eighteen thousand two hundred and eighty-seven dollars and ninety-nine cents (\$18,287.99), and the latter one of thirty-eight hundred and seventy-four dollars and fifteen cents (\$3,874.15) had

attached the assets of the company in New York, and if successful, would have had their claims paid in full, to the injury of the other creditors. It became important to resist these suits, and, together with Mr. Kitchen, the New York attorney, they investigated the questions of jurisdiction involved and agreed upon the line of action which resulted in a final defeat of the suits and the purchase by the assignee of these claims for a trifle less than forty-five per cent. of their face value, for the benefit of all creditors.

In order to obtain money to buy claims, the trustees borrowed, first and last, the sum of thirty-seven thousand dollars from the National Bank of Illinois, and, adding thereto the notes signed by them to secure the balance of purchase-money due by them on account of buying the plant, they, during their trust, incurred on behalf of the trust creditors an indebtedness of eighty-three thousand two hundred and fifty dollars, all of which has been repaid with the dividends declared by the assignee.

The trust creditors, notwithstanding the expense of the trust, have received within one and one-half per cent. as much as those creditors not entering into the trust, and, in addition, will receive in proper proportion all future dividends that may accrue on eighty-two thousand six hundred eighty-one $\frac{32}{100}$ dollars of claims now held by the trustees for their benefit (a schedule of which is submitted attached to this report showing also the amount paid by the trustees for each claim), besides enjoying the advantages accruing to the estate of the company from the efforts of the trustees.

There is still due the bankrupt estate claims, not including some small ones of doubtful value, amounting on their face to 76 about one hundred and sixty-four thousand dollars. Dividends that will hereafter accrue will unquestionably make the amounts paid to parties to these agreements exceed the amounts paid and to be paid by the assignee to general creditors who refused to join in the trust.

It is provided by the trust agreement that the trust shall cease at the expiration of one year from October 9, 1891, and that the trustees shall then distribute all assets in their hands *pro rata* among the creditors. The difficulty that now arises for the trustees is caused by the fact that the only assets, except a small balance of cash on hand, are a large number of claims assigned to them, which cannot be divided *pro rata* by assignment among the three hundred and seven thousand dollars of creditors that have entered into the agreement (a list of whom is attached to this report, showing the amount of their respective claims) without great difficulty and expense. The trustees would, therefore, suggest that the parties to this agreement sign the proposed trust agreement sent to them with this report, whereby the trustee shall be authorized, without expense to the beneficiaries under the trust, to collect all dividends that may accrue hereafter on such claims, and divide the same among the parties to this agreement in the proportions provided for under the trust agreement of October 9, 1891. The trustees will agree to do this free of further charge to the parties under the latter agreement.

The trust agreement also provides that all persons parties to the

same who have collateral securities shall not be prevented, by reason of their entering into the agreement, from pursuing such collateral remedies. The German savings institution, with a claim of ten thousand dollars, Leo Rassieur and Rassieur & Schnurmacher, with claims aggregating three thousand dollars, making a total of thirteen thousand dollars, were held by the county court of Cook county to be entitled to a preference. Before this decision was rendered fifty-five per cent. of the claims was paid to the trustees, of which they have returned to said parties fifty-three and one-half per cent. From the assignee, therefore, these parties can expect no further funds, and, as the trustees collected fifty-five per cent. of their claim, and by payment to the said parties of the balance by the assignee, said parties have only an interest to the extent of one and one-half per cent. of their claim in the trust claims, the trustees paid said parties the balance due them on their claim, and thereby eliminated therefrom all further participation.

It was further provided by the trust agreement that if Leo Rassieur, Jacob W. Skinkle, Frederick Wideman, and Joseph
77 Koenigsberg signed the said agreement and thereby agreed to aid in collecting the assets in a manner satisfactory to said trustees, then, in consideration of such services, it was covenanted by all the parties signing the said agreement to release and discharge said Rassieur, Skinkle, Wideman and Koenigsberg from all liability by reason of said parties assenting on their part to the creation of indebtedness by the insolvent corporation in excess of its capital stock, and from all alleged liability as stockholders of said insolvent, or any claim against them as alleged copartners.

These trustees further report that Leo Rassieur, Jacob W. Skinkle and Frederick Wideman have aided, to the entire satisfaction of said trustees, in the collection of all assets, and, in pursuance of the terms of such agreement, they have released said parties from the liabilities provided for in said agreement.

These trustees further report that their duties as such trustees will have entirely terminated as soon as the small balance of cash on hand has been distributed among the parties to the agreement, and this the trustees propose to do as soon as the next dividend, which will be five per cent. and declared at once, shall be paid by them to the parties to this agreement on account of purchased claims.

The trustees submit with this report an account of even date herewith showing receipts and disbursements.

These trustees further report that they kept a full set of books, showing all receipts and disbursements, which books are open for inspection at the office of Lackner & Butz.

The trustees cannot tell what the expense of printing their report may be, but whatever balance in their hands they agree to distribute in proper proportion.

Respectfully submitted.

CLARENCE A. KNIGHT,
OTTO C. BUTZ, *Trustees.*

Chicago, February 21, 1893.

78 *Account of Clarence A. Knight and Otto C. Bulz, as Trustees of Certain Creditors of Consolidated Ice Machine Company, under Agreement Dated October 9, 1891.*

This account being of date February 21, 1893.

DR.

To cash received from Robert E. Jenkins, assignee of Consolidated I. M. Co., dividends on claims represented by trustees, either as purchased claims or as parties to agreement, as follows:

1891.			
Dec.	10.	To dividends paid by Jenkins and applied to loan of \$27,000 negotiated by trustees with National Bank of Illinois to obtain money for purchase of claims.	\$27,000.00
	"	" " dividends paid by Jenkins to National Bank of Illinois to pay interest accrued on trustees' loan	110.33
1892.			
Jan'y	30.	" cash received from Jenkins on % 20 dividend	15,184.32
Ap'l	2.	" " " " " " and paid to National Bank of Illinois to satisfy \$10,000 loan of trustees	10,000.00
	"	" " cash received on % dividends, which was applied to pay't of trustees' notes, given to secure balance due on purchase of plant..	23,500.00
	"	" " cash rec'd on % dividends applied to paym't of balance principal due on plant.	30,467.08
	"	" " dividends retained by Jenkins to apply on interest due on notes to secure balance purchase-money for plant.	539.23
Ap'l	6.	" cash received, 35 % dividend	105,134.18
	19.	" " " dividend on % Butler & Gardner claim	95.23
	"	" " " " " " G. W. and W. H. Bamm claim	47.03
	"	" " " " " " Chas. H. Haswell	18.64
Oct.	18.	" " " " " " Slabby claim..	50.00
Dec.	3.	" " " " " on sundry claims purchased, on which entire 55 % of dividends were paid to trustees, and which claims cost trustees less than 55 %	52.31
The above being the total cash dividends received from assignee.			
Feb'y	2.	" premiums returned on insurance	26.80
	24.	" " " " " " " "	6.30
May	10.	" cash received from Jno. Featherstone Sons, interest on their \$5,000 note due trustees.	29.17
			<hr/> \$212,260.62

CR.

1891.			
By cash paid for claims purchased at various dates			
Dec.	10.	" " " L. B. Zink, watchman	\$33,573.31
	"	" " " E. M. Teall & Co., insurance ..	45.00
	"	" " " interest on \$27,000 note, due National Bank of Illinois, through Jenkins, as above	23.25
	22.	" cash paid R. E. Jenkins for rent of plant..	110.33
	"	" " " " " " insurance	358.33
	"	" " " " " Chicago Telephone Co. to secure performance of services by watchman....	296.00
			<hr/> 33.00

1892.					
Jan'y	2.	"	cash paid hotel and traveling expenses of Knight and Butz, on trip east, of two weeks' duration; this includes trip to New York, Philadelphia, Washington and Trenton, made in November.	300.00	
	27.	"	cash paid L. B. Zink, watchman.	75.00	
	30.	"	" " R. E. Jenkins, January rent ...	358.33	
Feb.	10.	"	" " Knight & Brown, cash expenses of 2d trip east, as per bill.	194.20	
		"	cash paid Lackner & Butz, cash expenses of 2d trip to New York, as per bill.	183.46	
	11.	"	cash paid Harvey & Co., insurance on plant.	37.50	
	16.	"	" " L. B. Zink, watchman, to Feb. 1, 1892	64.25	
Ap'l	2.	"	" " Maynard's trip east, to buy claims, as per bill	262.75	
		"	" " " " interest on amount owing by trustees on plant	539.23	
	16.	"	" " " " Harvey & Co., insurance on plant.	190.00	
	18.	"	" " " " Geo. T. Farmer, " " " "	157.50	
May	18.	"	" " " " " " " " " " " "	15.00	
Oct.	8.	"	" " " " Lackner & Butz, expenses of Butz on third trip east.	123.35	
		"	" " " " expenses of Knight to Pittsburg on argument of case	19.00	
1893.					
Feb'y	23.	"	cash paid Knight & Brown, sundry small expense items	7.00	
		"	" " " " at various times, dividends to creditors, represented by trust agreement	163,993.19	
		"	" amount retained by trustees for their services, being each \$2,500..... ..	5,000.00	
		"	" cash on hand for distribution, subject to printing charges	321.64	
				<u>\$212,260.62</u>	<u>\$212,260.62</u>

List of Claims Purchased by Knight & Butz, as Trustees, Showing Amounts of Respective Claims Against the Consolidated Ice Machine Company and Amounts Paid by the Trustees for Their Purchase.

Name of claimant.	Amount of claim.	Paid for claim.
J. H. Williams & Co.....	\$3,116.03	\$1,246.41
H. Voght & Bros.	19,209.26	7,683.69
Jno. Maneely.....	3,994.11	1,597.65
John Comminsky	1,309.50	523.00
80 W. Gaskill & Son....	350.06	140.02
W. E. Johnson & Co.....	28.80	11.52
Amberg File & Index Co.	8.40	3.36
C. H. Besly & Co.....	54.45	21.78
J. H. Bryant & Bros.....	7.12	2.74
H. Channon & Co.....	20.97	8.38
G. R. Carpenter & Co.....	15.81	6.32
Crerar, Adams & Co.....	62.83	25.13
Dickinson Bros. & King.....	10.75	4.30
Fuller & Fuller Co.....	71.40	28.56
M. J. Fitch Paper Co.....	5.38	2.15

C. H. Gurney Co...	27.20	10.88
W. Habercamp.....	70.00	28.00
Hodge & Homer Co.....	25.08	10.03
Marinette iron works.....	6.79	2.71
Ogden & Katzenmeyer.....	12.60	5.04
M. Feigel & Bros.....	33.50	13.40
Halm & Becker.....	48.00	19.20
B. O'Neill.....	142.25	56.90
Benedict, Mellroy & Fowler.....	297.14	118.85
Franz Mayer.....	22.00	8.80
Abendroth & Root Mnf. Co....	42.42	16.96
Benj. Gillespie....	302.27	120.90
J. A. Prout.....	48.25	19.30
Geo. Mooney's Son....	152.72	61.08
Freeland tool works.....	94.16	37.66
Neyer Bros.....	2.65	1.06
Brewers' Journal Co....	43.75	17.50
C. Jourgensen.....	5.25	2.10
National Oil Works & Mill Supply Co....	130.13	52.05
J. Nordinger.....	210.32	84.12
L. Howard Jenks....	7.30	2.80
G. Thornburn & Co.....	5.75	2.30
Ed. Hunt's Sons.....	24.00	9.60
R. C. Douglas.....	11.05	4.42
Standard Oil Co.....	248.04	99.21
N. Y. Safety Steam Power Co.....	90.05	36.02
T. W. Harvey Lumber Co....	51.13	20.45
Maisch & Scheurbuer.....	135.33	54.13
H. M. Hooker & Co.....	10.74	4.30
Geo. F. Houston & Co.....	21.48	8.58
Reuben Jenkins.....	6.25	2.50
E. Kirk, Jr.....	28.80	11.52
Lehner-Johnson-Hoyer Mnf. Co.....	139.20	55.68
Leonard & Ellis.....	45.00	18.00
Thos. C. Massey.....	18.40	7.36
Maypole Bros.....	11.98	4.78
81 Medart P. P. Co....	2.53	1.00
A. Plamondon Mnf. Co.....	13.95	5.58
Scoville Mnf. Co.....	168.30	67.32
Simons Mnf. Co.....	3.30	1.32
Thayer & Jackson Stationery Co.....	31.18	12.46
Stuart & Hill.....	12.25	4.90
Weber Bros.....	27.29	10.90
H. S. Rich & Co.....	42.50	17.00
T. O. Pierson.....	106.82	25.00
Morrell & Lubeck.....	2,546.80	1,017.70
C. M. Fay & Co.....	654.01	261.60
C. A. Schieren.....	83.90	33.56
J. J. O'Grady.....	627.58	251.03
U. S. Electric Lhtg. Co.....	5.20	2.08
Grand Rapids Machinery Co....	50.00	20.00

Raze & Davis.....	15.00	6.00
Nubian Iron Enamel Co.....	108.00	43.20
Neil McMillan.....	235.00	94.00
Telephone Transfer Co.....	47.00	18.80
Geo. E. White & Co.....	23.60	9.44
J. F. Rogers & Co.....	10.35	4.12
Jno. S. Hall... ..	24.13	9.64
Jno. Brown & Son... ..	22.52	9.00
W. F. Trimble.....	188.83	75.53
H. R. Fisher... ..	22.00	8.80
J. Hedenkamp.....	1,779.06	711.62
E. & F. Barbig... ..	406.68	162.67
Cahill Bros.....	125.92	50.36
J. B. Add.....	61.15	24.46
Jno. McInnis.....	205.80	82.32
E. Harrington & Sons.....	2,913.17	1,165.26
V. H. Becker.....	507.96	203.18
Tatham & Webster... ..	180.25	72.10
Matchworth Bros.....	5.00	2.00
E. McNeill... ..	42.11	16.84
Witter & Kenyon.....	1,216.68	486.67
Jno. Kress Brg. Co	57.50	23.00
Garlock Pckg. Co.....	119.95	47.98
Jno. Schwabeland.....	21.81	8.72
Hy. H. Vought.	101.61	40.61
National tube works.....	2,090.74	836.29
A. Swadkins.....	555.61	277.80
J. M. Westerline.....	117.26	46.00
American Tube & Iron Co.....	14,082.90	7,041.45
Forsberg & Murray.....	34.90	13.96
Wallace & Bros.....	13.85	5.54
Philip Straus.....	765.00	306.00
82 Candee & Smith.....	3.25	1.30
Garvin Machine Co.....	7.00	2.80
Sam'l Loag.....	300.00	120.00
L. Schutte & Co... ..	19.50	7.80
Carroll, Porter Boiler & Tank Co... ..	35.00	14.00
Henderson & Bro.....	73.10	29.24
Jas. Boyd & Bro.....	48.85	19.54
A. L. Smith & Co.....	26.59	10.64
Geo. S. King.....	347.23	138.90
A. M. McNish & Son	63.29	25.31
W. R. Stoughton.....	12.00	4.80
J. E. Lonergan & Co.	46.70	18.68
Tallmann, McFadden & Co.....	93.54	37.41
D. H. McGookin & Co.....	139.99	55.99
O. F. Zurn & Co.....	67.26	26.80
H. S. Kendrick... ..	100.00	40.00
Bergner & Engel.....	80.49	32.19
Aug. Nahm.....	35.00	14.00
Chas. J. Field.....	56.96	22.78

Stokes Bros.....	141.06	56.42
Wm. Northrop & Co.....	150.00	60.00
J. W. Gaskell & Son.....	59.52	23.80
J. F. Kincaide.....	17.85	7.15
H. Thorsen.....	146.69	58.67
N. W. Rubber Co.....	319.02	145.55
T. J. Hojer.....	30.50	12.20
D. J. Roche.....	6.00	2.40
Cook & Radley.....	3.00	1.20
Mayor, Lane & Co.....	14.11	5.64
Jos. Woodruff.....	115.00	46.00
Loomis & Gillespie.....	142.49	56.99
Sebastine Mufg. Co.....	4.25	1.70
C. T. Weger.....	175.00	70.00
Vulcan iron works.....	9,700.19	2,910.06
Marine Oil Co.....	18.15	7.26
Felton, Rau & Sibley.....	26.44	10.58
H. W. Middleton.....	38.88	15.55
Pedrick & Ayer.....	20.00	8.00
R. G. Crump.....	198.06	79.22
J. Lauderbach.....	13.75	5.50
Jas. Curran.....	303.95	121.58
F. B. Forsythe.....	1,825.16	730.06
Forster, Hotaling & K.....	50.00	20.00
Wm. McKay.....	5,526.77	2,254.91
Western Electric Co.....	10.00	4.00
Charles H. Haswell.....	33.90	13.56
Butler & Gardner.....	272.10	81.63
G. W. & W. H. Bumm.....	134.38	40.31
83 Halpin, Kennedy & Co.....	28.82	11.53
Jas. Slabby.....	231.45	92.58
Jno Wilde.....	32.34	17.78
Sam'l C. Turner.....	5.44	2.99
Conlin & Hass.....	18.50	10.17

Total.....	\$82,681.32	33,573.31
	5	

413,406.60

List of Claimants Signing Trust Agreement of October 9, 1891, with the Amounts of Their Respective Claims.

Name.	Amount.
Featherstone Sons.....	\$135,896.36
German Savings Institution.....	10,596.67
F. Wideman.....	2,119.33
L. Rassieur.....	1,059.66
L. Schlossstein—one-half Crane claim.....	40,123.62
M. Feuerbacher.....	21,155.00
German Savings Institution.....	15,880.00

Home national bank.....	15,822.50
Rassieur & Tiffany.....	2,400
Rassieur & Schnurmacher.....	2,462.15
L. Schlossstein.....	10,575.84
Kelly, Maus & Co.....	5,792.82
M. McIntyre.....	671.09
Eugene Skinkle.....	256.36
Harry Skiinkle.....	160.26
S. B. Tainter.....	54.39
Belden Machine Co.....	12.45
W. A. Chapman.....	558.78
Chicago Foundry Co.....	3,809.76
Duquesne Forge Co.....	678.59
William Ganshaw.....	9.00
Jones & Laughlin.....	116.31
Morris machine works.....	4,845.00
Nason Mfg. Co.....	9,066.87
Pittsburg Steel Castings Co.....	2,485.93
Starkweather & Williams.....	51.20
Taylor Bros. & Co.....	54.00
Vacuum Oil Co.....	193.14
Vierling & McDowell.....	1,994.06
Weaver, Getz & Co.....	2.50
Weir & Craig Mfg. Co.....	105.45
Peter Wilkes.....	47.85
Yale & Towne Mfg. Co.....	554.06
S. J. Little.....	710.81
Geo. Roberts.....	119.41
84 Shook, Anderson & Co.....	1,132.46
J. P. Marsh & Co.....	590.10
J. W. Skinkle.....	192.31
Pittsburgh Salt Co.....	286.88
Cleveland City Forge & Iron Co.....	5,073.81
E. W. Blatchford & Co.....	81.86
I. Blumenthal.....	950.00
Crane Elevator Co.....	342.49
E. Deitzgen & Co.....	30.78
W. C. Kueffner.....	1,201.37
National Ammonia Co.....	9,700.14
Chas. Rietz Bros.....	166.25
A. C. Wagner.....	825.00
D. W. McKindlay.....	365.38
Total.....	317,380.05

Q. I notice that in your report, under date of December 22, and also under date of January 30, you credit yourselves with having paid rent to Mr. Jenkins?

A. Yes, sir.

Q. On what account was that?

A. On account of our having possession of the property on the

west side, where the factory of the Consolidated Ice Machine Company had been located, or was located.

Q. When you took possession of the plant there were certain ice machines, and portions of ice machines in different degrees of completion, were there not?

A. I don't remember that there were any ice machines—incomplete ice machines; there were portions of ice machines there, and a large number of tools, and a large amount of machinery.

Q. Weren't there some machines that were nearly completed?

A. I don't remember any.

Q. You haven't any recollection of making any arrangement with Mr. Joseph Koenigsberg with reference to the sale and disposition of any machines?

A. We made no arrangements to sell any machines to Joseph Koenigsberg; we sold no machines whatever.

Q. Did you make any sale or disposition of any property between the time that you made the purchase and the time of your sale to John Featherstone's Sons?

A. I think there were some few pieces sold to them, but I am not sure. I would have to read over the report, and look up my papers to make sure of that, it is five years ago.

Q. Did you, after you made this purchase, or about the time of the purchase, take any steps to form a corporation to operate this plant?

A. We did not.

Q. Did any of the parties represented by you, so far as you know?

85 A. They did not so far as I know. It was never intended to manufacture any ice machines or sell any.

Q. I see by the fifth clause of the contract creating the trust it is provided that the trustees may, if you deem it advisable, form a corporation under the laws of the State of Illinois, to carry on said ice-machine manufacturing business for the purpose of realizing on said assets, &c.?

A. Yes, sir.

Q. It was within the contemplation of the parties, then, at the time of this agreement?

A. The agreement speaks for itself, that is all I know what the parties contemplated.

Q. Nothing of the kind, you say, was done?

A. Was done, no, sir.

Q. No steps taken?

A. No steps taken.

Q. I will ask you whether the trust was carried out and discharged, with the exception of the formation of the corporation referred to in the fifth and sixth clauses of this agreement, as provided in this agreement, so far as you know?

A. The trust has not been discharged yet—that is, is not discharged at this time. We still are to collect all dividends that may be declared, and distribute among the claimants the proceeds.

Q. With that exception it has been carried out, has it?

A. Yes, I think the——

Q. And the trust has been continued, as I understand, under the terms of that paper, a copy of which I hand you?

A. Yes, sir, I believe that was signed by all of them, although I have not the document before me, and it is barely possible that one or two may have failed to sign.

MR. ALDRICH: I offer the paper in evidence and ask that it be marked Defendants' Exhibit 7; it is as follows:

To Clarence A. Knight and Otto C. Butz, trustees under agreements by certain creditors of the Consolidated Ice Machine Company, appointing them trustees, all dated October 9th, 1891:

We, the undersigned, creditors of the said Consolidated Ice Machine Company, and parties to said agreements, do hereby acknowledge that we have examined the final account rendered by the said trustees, and their final report, all bearing date the 21st day of February, 1893, and have found the same correct and satisfactory.

And the undersigned further *hereby ratify and confirm all the actions of said trustees in connection with said trust agreements, and the performance of the terms of the same, and consent to and hereby* appoint Clarence A. Knight and Otto C. Butz trustees for them,

to collect all dividends that may accrue and become due
86 on account of claims against said Consolidated Ice Machine Company, purchased by the said trustees, under the terms of such agreements of October 9, 1891, for the benefit of all the parties to the same, and, for that purpose, do hereby assign, transfer and set over all their right, title and interest in and to such purchased claims, to said Clarence A. Knight and Otto C. Butz, to hold the same upon the new trusts hereby created, said trust being conferred upon condition that said trustees shall make no charge for their services in collecting said dividends accruing on said claims and making immediate distribution of such dividends among the parties to said agreements in the proportion that each of the parties to said original agreements of October 9, 1891, have received their dividends heretofore declared by said trustees under the latter agreement.

In witness whereof, we have hereunto set our hands and seals, this 21st day of February, 1893.

—— —. [SEAL.]
—— —. [SEAL.]

Q. Have you a copy of the agreement under which you sold this property to John Featherstone's Sons?

A. I have not. I have looked up my papers and can't find it. I think Mr. Knight has that.

Q. What part did Messrs. Russieur, Skinkle, and Wideman take in the purchase of claims against the Consolidated Ice Machine Company, and in the collection of the assets?

A. What Skinkle is that you are mentioning?

Q. J. W. Skinkle.

A. None whatever, except as parties to this agreement. We acted for them as trustees under that agreement.

Q. My question is directed as to what they did personally, with reference to the management or participation in the work contemplated by this trust agreement?

A. They took no part at all. It is possible that if I was not familiar with some of the business that I may have asked Mr. Skinkle about it, but they took no active interest in the management of the trust; matters were decided by Mr. Knight and myself. There was a son of Mr. Skinkle a portion of the time in the employ—no, he was in the employ of the assignee, we had nothing to do with him.

Q. In your report, which has been introduced in evidence, under date of February 21, 1893, you call attention to the fact that by the terms of the trust agreement, it was provided that the gentlemen named, including Mr. Koenigsberg, should aid in collecting the assets in a manner satisfactory to said trustees, then in consideration of such services it was covenanted by all the parties signing said

agreement, to release and discharge said Rassieur, Skinkle, 87 Wideman, and Koenigsberg from all liability by reason of said parties assenting, on their part, to the creation of indebtedness by the insolvent corporation in excess of its capital stock, and from all alleged liability as stockholders of said insolvent, or any claim against them as alleged copartners. And you continue: "These trustees further report that Leo Rassieur, Jacob W. Skinkle and Frederick Wideman have aided to the entire satisfaction of said trustees in the collection of all assets, and in pursuance of the terms of such agreement they have released said parties from the liabilities provided for in said agreement." Does that refresh your memory any, and enable you to say what these gentlemen had done?

A. Well, they aided us with their advice I presume, and that is about all that they did do.

Q. What was this claim against them as alleged copartners referred to in your report?

A. It was the claim mentioned in the agreement—some persons, parties claiming, if I remember right, that the various stockholders or directors, rather, of the Consolidated Ice Machine Company that had consented to the incurring of an indebtedness in excess of the capital stock, were personally liable for such excess.

Q. Under the Illinois statutes?

A. Under the Illinois statutes.

Q. That is referred to by the language, "indebtedness by the insolvent corporation in excess of its capital stock;" my question is, or any claim against them as alleged copartners; to what does that refer?

A. I believe that some person claimed at the time that the corporation was not legally organized and that these parties were liable as partners. I believe there was a suit pending which—

Q. Do you refer to the suit by the State's attorney?

A. I think it was; yes, sir.

Q. You released them also from all alleged liability as stockholders of said insolvent; what does that refer to?

A. I don't know, unless there was some—I don't know. Only in reference to any possible liability for failure to pay up for the stock, I don't know of anything else. I don't remember that there was any question in this case as to whether that stock had been fully paid up or not.

Q. Did you and Mr. Knight put a chattel mortgage on this property when you first bought it?

A. I think we did; I think it was a purchase-money chattel mortgage, given to pay Mr. Jenkins the amount we paid him on the purchase.

Q. How long have you known Mr. J. W. Skinkle?

A. I think I made his acquaintance about the time of the execution of the agreement.

88 Cross-examination.

By Mr. RASSIEUR:

Q. Was there anything more done in the matter of carrying out the trust created by the trust agreement which was offered in evidence, than the purchase of the assets from the assignee of the Consolidated Ice Machine Company, and the securing of the purchase-money until it was paid, by the execution of a chattel mortgage, the sale of these assets to Featherstone's Sons, the purchase of claims against the insolvent, and collection and distribution of the dividends declared by the assignee?

A. There was not anything else done except that we assisted in New York and Philadelphia in making settlements with various parties owing the assignee, for which I think the assignee paid us.

Q. Isn't it also a fact that I rendered all the assistance in my power to the assignee, toward collecting all outstandings of the Consolidated Ice Machine Company?

A. Yes; you advised us and did all that lay in your power to do.

Q. That was also done, as far as you know, by Mr. J. W. Skinkle?

A. It was.

Q. Mr. Frederick Wideman?

A. It was. I think Mr. Wideman assisted us in St. Louis in making some purchase of claims.

Q. You are quite sure, are you not, that there was no carrying on of the business of manufacturing and selling ice or refrigerating machines during the time that you had charge of this trust?

A. I am positive we did not carry on any manufacturing whatever, we merely sold the assets.

Redirect examination:

Q. In making your last answer, you mean except as provided by the terms of your transfer to the Featherstones, do you not?

A. We made a sale of the assets to the Featherstones.

Q. Conditional or otherwise?

A. I don't remember, I would have to see the agreement to refresh my recollection.

Q. You did whatever the contract between you and the Featherstones required you to do, didn't you?

A. I don't remember what that contract says, I haven't a copy of it.

Q. There has been no question of a breach of the contract has there?

A. There has not.

Q. So far as you know, the business was carried on as provided for between you and Mr. Knight on one side, and the Featherstones on the other?

89 A. My only recollection is that we sold the goods to them and that they paid us for them. It seems to me—I have no recollection of any agreement which provides for anything else than a plain, simple sale.

MR. ALDRICH: Mr. Knight, I will ask you to produce the agreement, if you have it.

MR. KNIGHT: (to Mr. Butz): I hand that to you as my cotrustee, Mr. Butz.

Q. What is the nature of the agreement between yourself and Mr. Knight and the Featherstones?

A. I don't know this agreement was ever entered into. This is a copy not signed by me, and I don't know, I have forgotten the terms of any agreement that we made; I can't recognize that as being a copy of the agreement.

NOVEMBER 5, 1896.

CLARENCE A. KNIGHT, a witness called on behalf of defendant, being first duly sworn, testified as follows:

Direct examination.

By MR. ALDRICH:

Q. You may state your name.

A. Clarence A. Knight.

Q. Residence and profession?

A. Chicago; lawyer.

Q. You are one of the trustees for certain parties in the purchase of a portion of the assets of the Consolidated Ice Machine Company, I believe?

A. Yes, sir.

MR. RASSIEUR: It is understood that objection is made as to the relevancy, competency and materiality of this testimony, and the same will be ruled upon when this deposition is offered in evidence.

MR. ALDRICH: It is so understood.

Q. Have you a copy of the contract by which you, as such trustee, disposed of this property to John Featherstone's Sons?

A. I have what I understand to be a copy of it. The original of this was given to Mr. Butz, as my cotrustee, and retained by him, and I had a copy made at the time, and it appears to bear the sig-

nature of myself and Mr. Butz and the Featherstone Sons, and I am pretty sure this is a copy of it.

Q. I will ask you to produce it, Mr. Knight, with the understanding that if it be found inaccurate in any way, upon the procurement of the original the proper corrections may be made?

A. Well, this is my own document as trustee, and I should not want to give it up.

Q. I only ask it for the purpose of taking a copy of it, and upon the general question I think the master has ruled.

A. I also object to the surrender of this document, as I was attorney for some of the parties to this trust agreement, and I
90 simply do it under protest, and ask that the master rule upon the question whether I am bound to produce a document as attorney?

The MASTER: The master thinks the document should be produced and copied, but with leave to complainant to move to strike the same from the record at any time if he so desires.

Mr. ALDRICH: I introduce this in evidence, and let the copy be marked Defendants' Exhibit 8.

Mr. RASSIEUR: I object, especially to any copy being prepared from this copy, since the plaintiffs in this case, as far as I know, have never seen the original. So long as original can be got to be shown to you—

Mr. ALDRICH: I will state to counsel that I have called for the original, and when produced will compare whatever copy is made with the original.

The WITNESS: I find this document among my papers, with reference to this trusteeship, and it is my recollection that it was retained by me as being a copy of the original, and Mr. Butz insisted on keeping the original, as the Featherstones were my clients, and the other people were his clients. The papers signed by my clients he wished to retain in his possession. I am not sure, without investigating more closely whether the sale was finally consummated under that agreement or not.

EXHIBIT 8.

This indenture, made this 30th day of January, A. D. 1892, by and between Clarence A. Knight and Otto C. Butz, as trustees for John Featherstone's Sons, Leo Rassieur and other creditors of the Consolidated Ice Machine Company, of Chicago, under a certain agreement dated October 9th, 1891, said parties first (*part*) named to be hereafter known as the parties of the first part, and John Featherstone's Sons, a corporation under the laws of the State of Illinois, to be hereafter known as the party of the second part, witnesseth, as follows:

That the said parties of the first part having purchased from the assignee of the Consolidated Ice Machine Company under a certain bill of sale dated the 1st day of December, A. D. 1891, a copy of which is hereunto attached and marked "Exhibit A," certain of the

assets of said Consolidated Ice Machine Company consisting of all the machinery, tools, patterns and merchandise located at the factory of the Consolidated Ice Machine Company on Eighteenth street, in the city of Chicago, and including all patterns and drawings, 91 tools and machinery wherever situated, formerly owned by the Consolidated Ice Machine Company, which said bill of sale also includes the good will of the business of said Consolidated Ice Machine Company, for further particulars of said purchase reference being made to the said bill of sale hereunto attached and the orders of the county court of Cook county concerning said purchase, the said sale having been made by Robert E. Jenkins as assignee of said Consolidated Ice Machine Company under order of court to the said Clarence A. Knight and Otto C. Butz as trustees for the sum of sixty-nine thousand, seven hundred and fifty dollars (\$69,750.00).

And the said John Featherstone Sons, party of the second part, in consideration of the matters in this agreement set forth, hereby covenant and agree with the party of the first part to take good and proper care and custody of the said machinery, drawings, patterns and merchandise wheresoever situated after they shall have taken possession thereof, at its own expense, which possession they agree to take at once. That it will make every reasonable effort to dispose of said machinery and stock at its own expense and will pay over the proceeds of said sale to said Knight and Butz, trustees, up to the sum of five thousand dollars (\$5,000.00) in cash, on or before March 1st, 1892, as the proceeds of sale of said machinery and stock from the said party of the second part. All moneys received by said party of the second part for the sale of either machinery or merchandise after the said five thousand dollars (\$5,000.00) has been paid to said parties of the first part, shall be equally divided between the said trustees and the said John Featherstone's Sons. Until said additional sale shall reach the sum of sixty-four thousand seven hundred and fifty dollars (\$64,750.00), the amount retained by the said John Featherstone's Sons, party of the second part, shall be treated by the parties of the first part as payment to them on account of dividends to be declared out of the trust fund now held or to be held by said Knight & Butz, trustees as aforesaid; and the said party of the second part shall give said trustees credit, the same as if said trustees had paid over to them the said amount from the trust fund in cancellation of any dividends accruing to it out of said trust funds, the said party of the second part to give to said trustees receipts from time to time as may be demanded, of the amount of such payments.

It is further covenanted and agreed between the parties of the first and second part, that after the five thousand dollars (\$5,000.00) has been paid as hereinbefore set forth, and the sixty-four thousand seven hundred and fifty dollars (\$64,750.00) has been received from sales of said machinery, and divided and accredited as hereinbefore set forth, then all said property, including machinery, drawings, patterns, merchandise, or any other material, 92 wherever situated, and the good will of the aforesaid plant, there-after remaining on hand, shall become the absolute and sole prop-

erty of the said John Featherstone's Sons, and said trustees shall give to said John Featherstone's Sons a bill of sale of all the property so remaining, including the good will, of like kind as was received by them from the said assignee, and said party of the second part has the right to dispose of the same at its option as said party of the second part would any property unto it belonging: Provided, however, that if said party of the second part shall pay in cash to said trustees at any time prior to October 8, 1892, the sum of thirty-two thousand three hundred and seventy-five dollars (\$32,375.00), and said sum of five thousand dollars (\$5,000.00) and give receipts for dividends for balance of thirty-two thousand three hundred and seventy-five dollars (\$32,375.00), then the above-mentioned bill of sale shall at once be given.

It being further agreed by said party of the second part in consideration of the agreements herein contained that it will pay to said party of the first part the sum of thirty-seven thousand three hundred and seventy-five dollars (\$37,375.00) in cash, less any amount received from sales of property by said trustees, prior hereto to other parties than said party of the second part, said sum of thirty-seven thousand three hundred and seventy-five dollars (\$37,375.00) to be paid on or before October 8, 1892, five thousand dollars thereof (\$5,000 00) to be paid prior to March 1, 1892, as above recited, unless the time for the payment thereof should be extended by the trustees, and the balance of sixty-nine thousand seven hundred and fifty dollars (\$69,750.00), namely, the sum of thirty-two thousand three hundred and seventy-five dollars (\$32,375.00) to be charged to said John Featherstone's Sons against dividends accrued or to hereafter accrue from time to time out of said trust funds. For all of the said machinery, patterns and drawings, merchandise and good will the parties of the first part shall receive from said John Featherstone's Sons the sum of sixty-nine thousand seven hundred and fifty dollars (\$69,750.00) after said machinery is disposed of and in any event on or before October 8, 1892, as heretofore recited, thirty-two thousand three hundred and seventy-five dollars (\$32,375.00) of said amount to be treated as paid out of the trust-fund dividends of said second party accrued or to accrue and in the hands of the parties of the first part and the property of the party of the second part, and the balance of thirty-seven thousand three hundred and seventy-five dollars (\$37,375.00) to be paid in cash out of the proceeds of sales of said machinery, etc., as hereinbefore
 93 set forth, or as heretofore recited in any event on or before October 8, 1892, unless the time should be extended as heretofore stated.

It is agreed by the parties of the first part to pay all premiums for insurance on said property not already paid and in case said property should be destroyed or damaged by fire said insurance shall be paid to said trustees and applied as far as necessary to cancel and satisfy any deficiency there may be in the aforesaid agreement to pay thirty-two thousand three hundred and seventy-five dollars (\$32,375.00) cash as aforesaid, and the balance to be paid over to John Featherstone's Sons. Said parties of the first part further agree

that if the insurance can be obtained to place on said plant an additional insurance of thirty thousand dollars (\$30,000.00).

Said parties of the first part are to pay and cause to be cancelled a chattel mortgage now on said property running to R. E. Jenkins, assignee of said Consolidated Ice Machine Company, or in case said party of the second part shall be compelled to pay said mortgage then the amount of said payment shall be deducted from the sum to be paid said trustees in cash as aforesaid. -

In witness whereof the parties of the first part have hereunto set their hands and seals the day and year first above written, and the said party of the second part has caused these presents to be signed by its president, attested by its secretary, and its corporate seal to be hereto attached the day and year first above written.

CLARENCE A. KNIGHT, [SEAL.]
OTTO C. BUTZ, *Trustees*, [SEAL.]
JOHN FEATHERSTONE'S SONS,
By JOHN FEATHERSTONE, *President*.

Attest: A. J. FEATHERSTONE, *Secretary*. [SEAL.]

EXHIBIT "A."

Know all men by these presents that I, Robert E. Jenkins, assignee of the Consolidated Ice Machine Company of the City of Chicago, in the county of Cook and State of Illinois, party of the first part, for and in consideration of the sum of sixty-nine thousand and seven hundred and fifty (69,750.00) dollars, lawful money of the United States of America to me in hand paid, at or before the ensembling and delivery of these presents by Clarence A. Knight and Otto C. Butz, as trustees, also of said city of Chicago, of the second part, the receipt whereof is hereby acknowledged, have sold, assigned, transferred and delivered and by these presents do sell, assign, 94 transfer and deliver unto the said party of the second part all the following goods, chattels and property, to wit:

All the manufacturing plant of the said The Consolidated Ice Machine Company, including all machinery, tools, patterns, drawings, fixtures and furniture of every name and nature. The said property is contained in the building formerly occupied by said Consolidated Ice Machine Company and now occupied by party of the first part, situated on the south side of West Eighteenth street in the city of Chicago between Lumber and Mechanic streets, being the brick warehouse with frame office building, except the certain drawings and patterns thereof are now in the possession of John Featherstone's Sons in the city of Chicago also the good will of the business of the said The Consolidated Ice Machine Company; also all merchandise, stock on hand, including also all tools, furniture, fixtures and unused stock which may or may not be included in the inventories of the assignee and whether in Chicago or elsewhere, subject to allowance and adjustment as to certain property in possession of the De La Vergne Refrigerating Company as provided in order of court of December 2, 1892.

To have and to hold the said goods, chattels and property unto the said party of the second part, their heirs, executors, administrators and assigns, to and for their own proper use and behoof forever.

This bill of sale is made and executed pursuant to a sale of said property which has been duly made and approved under orders of the county court of Cook county, Illinois, entered of record in the matter of the assignment of said debtor.

In witness whereof I have hereunto set my hand and seal the 1st day of December, in the year one thousand eight hundred and ninety-one.

(Signed)

ROBERT E. JENKINS,

As Assignee of the Consolidated Ice Machine Company.

Q. What investigation would be necessary, Mr. Knight, to enable you to ascertain whether this is the agreement under which the disposition of the assets was ultimately made?

A. Well, it would require considerable. We had a good deal of trouble in making that deal; there was a good deal of wrangling about it. Mr. Thomas more immediately represented the Featherstones in that matter, and my recollection of it is that we thought we had an agreement made, and I think that was signed,
95 then I am not sure but what Mr. Thomas made a fuss about it and we finally adjusted it upon some such basis.

Q. I will ask you whether it is your practice to keep copies of preliminary agreements that are drawn for the purpose of signature, and to which objections are made?

A. Yes.

Q. Have you such preliminary agreements, or drafts of agreements with reference to this subject-matter?

A. I think I have, yes.

Q. I wish you would look in your files and see if you have.

A. Yes, here is one I have now, and hold in my hands.

Q. Under what date?

A. This is the 6th day of January, 1892.

Q. Have you any others?

A. This is interlined by myself and also by Mr. Butz. I hold another one.

Q. What date?

A. The same as the last, the 6th day of January, 1892, and that is apparently interlined and changed by myself some.

Q. Any others?

A. Yes, I have one the 11th day of January, 1892.

Q. Are any of these signed, Mr. Knight?

A. No, sir; there are blank places for signatures on the last one, dated the 11th day of January. I appear to have another copy of one dated the 11th of January, 1892, which has one page missing.

Q. That is also unsigned, is it?

A. Yes, sir, it has a pencil memorandum on top of it, second page missing, made by Mr. Butz.

Q. Do these unsigned drafts of agreements enable you or help

you to state whether or not this signed agreement was the agreement which was finally entered into?

A. Well, I haven't any doubt that the agreement similar to the one that is produced here and signed by the parties, was signed and delivered, but my doubt is as to whether it was finally consummated upon those lines or not. I recollect very distinctly that the object I had on behalf of the Featherstones was to get possession of the Consolidated plant and destroy it, and they to succeed to the business.

Mr. RASSIEUR: I move that all the testimony with reference to preliminary agreements that were not executed and delivered, as to the intention and object of the transfer, be stricken out, as entirely irrelevant and immaterial to the issues.

Q. I will have to ask you Mr. Knight, to take such means as are necessary to ascertain whether or not this agreement was finally carried out.

A. Well, I couldn't do that, Mr. Aldrich, because I have kept all those papers in a tin box, and I have gone through all those
96 papers, and this is what I find. And I haven't any doubt in my own mind that that was the agreement under which the transfer was made, but like all things five years old, and a great many things in connection with this affair have slipped my memory, but if there is any particular point in that particular agreement that you want, I think I could tell whether that was done or not.

Q. You may state when the Featherstones completed their payment for the property, and how.

A. The account books, kept by the two trustees, in possession of Mr. Butz, would show exactly the payments made, the dates of them and how it was done. My recollection of it is, without looking at the books, that they gave notes for part of it and the balance was charged against dividends coming to them from the assignee, and turned over to the trustees under the trust agreement.

Q. That was not done until October, 1892, was it, or thereabouts?

A. Done after that time. That agreement is in October, isn't it?

Q. This is January, 1892, and the payment was made in October, 1892, as I understand; is that correct?

A. I think so.

Q. Mr. Knight, so far as you know, this contract was carried out upon the part of both parties, was it not?

A. Yes, sir; so far as I know. At least, I know this, the Featherstones got possession of the machinery and the plant down at 18th street and we got paid for it.

Q. In due course of time?

A. My recollection was, that we bid in the plant and got title from the assignee and then we turned it over to the Featherstones and took payment in dividends accruing to them, and certain notes.

Q. You were not attorney for the St. Louis parties, were you?

A. No, sir; any further than so constituted by this trust agreement—this trusteeship.

Q. I will ask you whether you had any communication with

Judge Rassieur, representing himself or any of the St. Louis parties or with Mr. Skinkle or Mr. Wideman with reference to the management of this trust and the sale and disposition of its assets?

A. I think I did.

Q. I have served upon you a subpoena to produce any such communications, have you done so?

A. I have some here, yes, sir. I don't know about the production of correspondence between Mr. Rassieur and myself. It seems to me there ought to be a ruling, or consent by Mr. Rassieur
97 that I may use his correspondence. I shouldn't want to produce this correspondence under a subpoena, without an order of the court, unless Mr. Rassieur will consent to it.

Mr. ALDRICH: I will ask Judge Rassieur if he has any objection?

Mr. RASSIEUR: I would like to see first what you want me to waive objection to.

Mr. ALDRICH: I suggest that Mr. Knight show Judge Rassieur the letters. (Letters shown to Mr. Rassieur.)

Mr. RASSIEUR: I consent to your introducing any of these as far as my privilege is concerned, if I have any, maintaining, however, that this is all immaterial and irrelevant to the issues in this case.

Q. How active was Judge Rassieur in assisting you in the management of this trust?

A. In what respect?

Q. Both in the collecting of the assets and in the disposition of the property, purchase of claims, &c.

A. Well, he assisted us in the purchase of claims, and my recollection of it is, at the time we purchased this plant from the assignee, Mr. Rassieur came up here from St. Louis, and at the time of the making of the Featherstone contract I think Mr. Rassieur, as I remember it, assisted us in making that contract.

Q. That is for the sale to the Featherstones?

A. Yes; and he had always shown a disposition to do everything he could to help us and help the assignee realize on the claims owned by the Consolidated Company.

Q. How early did he engage in assisting you in the purchase of claims?

A. Well, Mr. Rassieur acted in the whole matter, as I remember it, from the time of the assignment, he assisted, or endeavored to assist in extricating the company out of its difficulty, and the first proposition was an endeavor to get a settlement on behalf of the main creditors against the Consolidated Company. I think that was in the spring of 1861 that I first met Mr. Rassieur in connection with it.

Q. I believe, Mr. Knight, that you issued a circular to the creditors, advising them not to sell at 60 cents, did you not?

A. Yes, sir, or caused it to be issued; it was issued by the Featherstone's Sons. I knew of it and advised it. I think that was before I met Mr. Rassieur.

Mr. ALDRICH: I offer in evidence a letter dated November 11,

1892, addressed to Clarence A. Knight, Esq., 87 Washington street, Chicago, and signed Leo. Rassieur, and ask that it be marked Defendants' Exhibit 9. This may be copied into the record and the original returned to Mr. Knight.

Also, in connection with this letter, and as a part of Exhibit 9, a letter of Clarence A. Knight to Leo Rassieur, Esq., of St. Louis, to which the letter of Leo Rassieur is an answer. They are as follows:

ST. LOUIS, November 11th, 1892.

Clarence A. Knight, Esq., No. 87 Washington street, Chicago, Ills.

DEAR SIR: Your esteemed favor of the 7th inst. came to hand on the 8th, and having conferred with the St. Louis claimants, I am now in a position to answer your favor.

My clients, who constitute all of the St. Louis claimants in the trust excepting the National Ammonia Company, decline to make the purchase which you suggest can be made. They are disinclined to make further investment. Since, however, it would be desirable to consolidate the claims in the way which you suggest, my clients have concluded to authorize me to make you a counter-proposition.

They own claims as follows, to wit:

Half of Crane Bros.' claim.....	\$46,123.62
Louis Schlossstein.....	10,000.00 and int
Rassieur & Schnurmacher.....	2,462.15
Rassieur & Tiffany.....	2,400.00
Home bank, G. S. I. assignee.....	15,000.00 and int.
German Savings Institution.....	15,000.00 and int.
Minna Feuerbacher.....	20,000.00 and int.
Total, \$111,000.00, and interest amounting to about \$4,000.00.	

Mr. Louis Schlossstein also owns claims as follows which are not a part of the trust combination, viz:

Goetz & Brada Mfg. Co....	\$2,716.00
Hartman & Clausen.....	16,590.84

On which two claims, fifty-five (55) per cent. have been paid by the assignee.

The St. Louis claimants, whom I represent, have an interest in the bought claims to the extent of about thirty thousand dollars (\$30,000.00), thus making their holdings a total of about one hundred and sixty-five thousand (165,000) dollars, claims against the company. They are willing to accept and propose to sell to you their claims for twenty-five thousand dollars, taking a portion of the same in cash and the balance on time in notes bearing six per cent. interest and secured by good indorsers. My calculation of the amounts of claims owned by Messrs. Featherstone's Sons shows that they own about one hundred and seventy thousand dollars, including about \$35,000.00 of the purchased claims.

The proposition as made by my clients therefore is over twenty-five per cent. better than your proposition. I have agreed and consented to the making of this proposition, promising to make good the loss to my clients, upon the theory that the trust-

tees and Featherstone Sons are to release me personally from *from* all liability as stockholder or otherwise on account of such claims as they have or will have against the Consolidated Co., inasmuch as I have performed every duty required of me.

Please submit the foregoing to Messrs. Featherstone's Sons for their consideration and convey to me their answer at your earliest convenience.

Your knowledge of the condition of the assets of the Consolidated and particularly of the outstandings thereof must convince you, as my knowledge does me, that there is quite a margin in the proposition as made by my clients and that the margin would certainly justify the purchase.

Regretting exceedingly my financial inability to act upon the proposition of Messrs. Featherstone's Sons as communicated in your favor, I remain,

Yours sincerely,

LEO RASSIEUR.

Leo Rassieur, Esq., St. Louis, Mo.

DEAR SIR: Your favor of the 31st ult. is at hand.

The amount of the Featherstone claim outside of the interest of the Crane claim is \$89,772.74. One-half of the Crane claim \$46,123.62, the trustees purchased for the benefit of the parties in the trust 140 claims.

You know all the claims in the hands of the assignee upon which he has not yet realized and you can figure from this about what the final dividend of Featherstone will be. We think they would be willing to take, if it can be arranged soon, about \$85,000 for all of their interest. They would be willing to take a portion of that in cash and the balance on time notes with good indorsers.

I think this would be a very good purchase upon your part and would fix the matter so that you could make the compromise so as to realize a nice sum of money over and above the amount in a very short time.

Please let us hear from you as soon as possible further in regard to this matter.

Yours very truly,

CLARENCE A. KNIGHT.

Q. I will ask you, Mr. Knight, to state what was the consideration of the release of Messrs. Rassieur, Skinkle, Wideman and Koenigsberg.

A. That they should render us every assistance possible in getting the trust agreement carried out, and they should also render
100 every assistance possible to the assignee to get the claims of the assignee against various parties collected.

Q. And they rendered such assistance, did they?

A. Yes. That is, I don't know about Mr. Wideman and Koenigsberg.

Q. You gave releases to all, did you not?

A. Yes.

Q. Did you confer freely with Judge Rassieur and the parties

whom he represented, with reference to your management of the trust?

A. O, yes.

Q. Sought to keep them advised at that time, did you not?

A. Yes, sir.

Q. This negotiation with Featherstone was long under way, was it not?

A. Yes, it was some time under way.

Q. You were attorney, or had been, for the Featherstones, hadn't you?

A. Yes, sir.

Q. And they were among the largest creditors, as I recollect, of this insolvent company?

A. Yes, sir.

Q. And did you keep yourself fully advised with reference to the assets of the Consolidated Ice Machine Company?

A. O, yes.

Q. So that you are able to state what their value was?

A. Well, I couldn't say that without—you refer to the claims held by the assignee against various parties, for the machinery, tools, fixtures, etc.? I couldn't say, I am not sufficiently posted on that. The fact that we paid \$69,000, we consider it a fair valuation upon the tools and machinery.

Q. That you bought?

A. That we bought.

Q. I won't ask you to express any opinion about the choses in action, or anything of that kind.

A. What was realized from them would be the best evidence of their value.

Q. When was the claim first made that the stockholders hadn't fully paid for their capital stock?

A. That was soon after the assignment; I filed a bill on behalf of Featherstone's Sons in the circuit court of Cook county asking for the appointment of a receiver, and to take the property out of the assignee's hands, and then also, immediately after the assignment I had Mr. J. W. Skinkle cited to appear for examination, and he was examined for the purpose of ascertaining whether there was not a stock liability, and also as to whether there were not some hidden assets.

Q. Have you a copy of that examination?

A. I think I did have, I don't know where it is now.

Q. The claim was made at that date then, or about that date, that the stock wasn't fully paid up?

A. Yes, sir.

Q. And when was the claim made and by whom, that these gentlemen interested in the Consolidated Ice Machine Company should be treated as copartners?

101 A. Well, I think that question was raised about the time I filed that bill for a receiver, I think. My theory of that was that there hadn't been any corporate organization, been a fraud upon the State of Illinois by it appearing that certain stock was sub-

scribed and paid for whereas, as a matter of fact it was not. It was simply trustees' stock and therefore there was never any corporate organization in accordance with the law.

Q. What was the total stock of this corporation, as organized?

A. I should have to examine the papers to ascertain that. I also secured the information to be filed against the company by the State's attorney.

Q. I will ask you, Mr. Knight, whether the De La Vergne Refrigerating Machine Company ever received any part of the assets of the Consolidated Ice Machine Company?

A. Not that I know of.

Cross-examination.

By Mr. RASSIEUR:

Q. Mr. De La Vergne was active in purchasing or making agreements for the purchase of claims against the Consolidated Ice Machine Company for a number of months after the beginning of April, 1891, was he not?

A. There was a gentleman named Mr. Waters who claimed to represent Mr. De La Vergne, and I understood did represent him, was very active in endeavoring to purchase claims against the consolidated company.

Q. Was anything at all done by the creditors in the matter of forming the trust agreement until after Mr. De La Vergne failed to make the purchase which he contracted to make?

A. No, sir; it was after that.

Q. In other words, Mr. De La Vergne's efforts in purchasing claims or procuring contracts for the purchase of claims had all been made, and his efforts had ceased, and he had refused to comply with any agreements to purchase before the creditors came together to make the best out of the assets of the insolvent?

A. Well, I couldn't say, Judge, as to whether he ever got any creditors to sign any agreement of purchase or not. I know after the time he had negotiations with me I never knew of his owning any of the claims or having an interest in any of them, except the claim against the company on account of a patent which he claimed to own. He purchased, so far as I know, none of the general claims against the company, and his efforts in that behalf wholly failed.

Q. Do you remember the date of the trust agreement?

A. It is already in evidence here.

Q. October 9, 1891?

A. Yes.

102 Q. You remember that the creditors came together in this city immediately prior to making that agreement, do you not?

A. Yes, sir.

Q. And do you remember a request being agreed upon for me to come from St. Louis to attend that meeting?

A. Yes, sir; I think you was requested to come.

Q. And at that meeting I lent all the assistance that seemed to be

possible to bring about such an agreement, in order that the interests of the creditors might be preserved?

A. Yes, sir.

Q. Was any claim bought by the trustees or any one of the parties to this trust agreement prior to the making of the trust agreement, as far as you know?

A. I think not.

Q. What became of this bill brought by you for the appointment of a receiver for the Consolidated Ice Machine Company?

A. That was dismissed.

Q. What became of the suit brought by the State's attorney to have the incorporation declared void?

A. That was dismissed.

Q. You never, as trustee with Mr. Butz, or on your own account as trustee, carried on the business of building, constructing and selling refrigerating or ice machines, did you?

A. No, sir.

Q. All you did do under this trust agreement, in the matter of handling the plant, was to dispose of it to the best advantage to Featherstone's Sons?

A. Well, we bought the plant for the purpose of disposing of it to anybody.

Q. But I say all you did do was to dispose of it to the best advantage to Featherstone's Sons?

A. Yes, sir.

Q. That is all that was done in the matter of disposing of these assets?

(No answer.)

Redirect examination:

Q. I understand you to say that so far as you know Mr. De La Vergne never succeeded in buying any claims?

A. Yes, sir.

Q. You knew that he offered 60 cents on the dollar, didn't you?

A. I think that was the amount he offered.

Q. And is that answer true likewise, so far as you know, as to the De La Vergne Refrigerating Machine Company?

A. I think so; yes, sir.

Q. You don't know, do you, that the De La Vergne Refrigerating Machine Company (—)?

A. I think so; yes, sir.

Q. You don't know, do you, that the De La Vergne Refrigerating Machine Company ever attempted to buy any claims?

103 A. No, sir, I only know that Mr. Waters said he represented either Mr. De La Vergne or the De La Vergne Refrigerating Company.

Q. Which one was it, Mr. De La Vergne, wasn't it?

A. I couldn't say now, from recollection as to which party he claimed to represent, but it was that institution, that is all I know.

Q. That institution or that man?

A. I say that institution or that man.

Q. You don't know which?

A. No, I don't know which.

Q. You have said that the two suits referred to in your original testimony were dismissed; they were not dismissed, were they, until after you had made this trust agreement, and this combination among the creditors?

A. The first suit was a bill in chancery for a receiver, to take the property out of the assignee's hands; we were defeated upon that proposition, the court holding that he had no power to take it from the assignee. My recollection is now that that thing sort of drifted along and was dismissed on the general call. Whether it was dismissed after this trust agreement or before, I don't know, I am inclined to think it was dismissed after. I know the *quo warranto* proceeding was dismissed long after the trust agreement, in fact, I think it was only dismissed last year.

Q. You have answered Mr. Rassieur that you didn't carry on the business, or manufacture or sell ice machines?

A. No, sir, we did not.

Q. The business was conducted, was it not, so far as you know, in accordance with the terms of this agreement, by John Featherstone's Sons?

A. The sale of the plant?

Q. The plant as sold to John Featherstone's Sons was conducted by them in accordance with the terms of this agreement, was it not?

A. So far as I know, they lived up to their agreement, and we lived up to it on our part, excepting, as I say, I think, Mr. Aldrich, that that plant was finally sold under the proviso in that contract that gave them the option to—

Q. That is, eight or ten months later they availed themselves of their option, and paid for it?

A. Let me see it and I will show you the clause I have reference to. (Looking at contract.) "Provided, however, that if said party of the second part shall pay in cash to said trustees at any time prior to October 8, 1892, the sum of \$32,375, and the sum of \$5,000, and give receipts for dividends for balance of \$32,375, then the above-mentioned bill of sale shall at once be given." My recollection of it is that under that proviso they took that plant.

Q. But until they did take the plant they conducted business under this agreement, did they not?

104 A. No, as my recollection is, the plant was shut down, nothing doing there at all, simply had a watchman.

Q. But they took the patterns into their possession, and the unfinished product into their possession, immediately on the signing of this agreement?

A. O, yes, they took the patterns.

Q. And went to work manufacturing ice machines, and been engaged in that from that date to this time, haven't they?

A. O, yes.

Q. And you termed the sale only a conditional sale to them until they made that payment, did you not?

A. Well—that is right, yes, of course.

Q. You didn't give them absolute title and control of the property until they had completed their payment, did you, under that proviso?

A. That is my recollection of it, and referring to the memorandum we have there in regard to the dividend, I think we took their note for thirty-two thousand odd dollars.

Q. At what date?

A. It doesn't show the date, the books will show the date exactly.

Q. In answering Judge Rassieur's question with reference to the sale of ice machines, you don't mean to say that this contract, although entered into, wasn't carried out, do you?

A. O, no.

(Q.) Mr. RASSIEUR: Which contract?

Mr. ALDRICH: The contract with John Featherstone's Sons, under the date of the 30th of January, 1892.

Mr. RASSIEUR: It hasn't been shown yet that there has been any such contract.

Mr. ALDRICH: I leave that to the evidence as it now stands, and with the understanding that I call on both Mr. Knight and Mr. Butz to produce the original.

A. My recollection of that is that we purchased the plant from the assignee, and after the purchase of the plant from the assignee we delivered to the Featherstones the patterns and drawings, &c., and they took them up to their shop, had them stored up there, and we practically turned over the possession and custody of the plant to them, on 18th street, and they did pretty near as they saw fit about it. The plant was simply in charge of a watchman then, there was no business being carried on by us, we didn't manufacture any machines at all.

Q. They did, though?

A. O, yes, they had manufactured machines before the Consolidated Company failed.

Q. What I call your attention to is that the title was not to pass, according to the terms of this agreement, until they had made certain payments?

A. O, yes, that is right.

105 Q. And that until that time all product-manufactured or sold was to be sold in the name of Knight and Butz, under the terms of the agreement?

A. Yes, sir; that is my recollection, and referring to that, I think there was some of the loose stuff there sold by Featherstones for us to some parties.

Q. Yes; I expect to prove that by another party later, Mr. Knight.

A. I don't remember now what there was, but there was some odds and ends of machinery there that was sold and accounted for.

Q. And how soon, if you know, did John Featherstone's Sons commence the work of completing the ice machines that were in process of manufacture, and the discharge of contracts that had been en-

tered into by the Consolidated Ice Machine Company after January 30, 1892?

A. My recollection of that would be, Mr. Aldrich, the consolidated company failed in 1890, the Featherstones at that time had some machines constructed and some partly constructed, and—

Q. At the date of the failure?

A. At the date of the failure, and that we made a claim against the estate for breach of contract, failing to take those machines, and that claim was finally allowed for some damages, and we were permitted to go on and complete the machines that were partially completed, and to sell the machines that were completed and to sell those that were partially completed and which were afterward completed. My recollection of it is now there were some 12 or 15 machines. Those machines had nothing to do with the assets bought by the trustees. How far they had possession of some of the patterns for the purpose of completing those machines, I don't remember; my recollection of it is that they had some of the patterns for the purpose of completing their machines, borrowed them of the assignee. They were there when the assignment was made, and those patterns of course in their possession were turned over to us by Mr. Jenkins under our purchase; and they had some drawings, as I remember. We never consented, as trustees, to the building or selling of any machines by Featherstones on our responsibility. They may have used our patterns and our drawings with our consent, for the purpose of manufacturing machines upon their own responsibility, and sold them. That is about as I recall the history of the events now. Of course it is five years ago and a good deal of it has escaped my memory, but I think that is about right. I am sure that Mr. Butz and myself both declined to assume any responsibility for manufacturing and selling of machines.

Q. What was the stock on hand and machinery which Featherstones agreed to sell?

106 A. Well, that was the ordinary machinery you would find about a large plant of that sort, and there were some castings on hand I think, some castings obtained from the Pittsburg Steel Castings Company that were on hand, and other things of that sort. We had a complete inventory at the time, and I think that complete inventory is in the possession of Mr. Butz, or Mr. Jenkins had one and it was delivered to us.

Q. You were the purchasers, as I recollect, of the good-will of the business?

A. Yes, sir.

Q. And sold that to the Featherstones?

A. Yes, sir.

Recross-examination :

Q. Featherstone's Sons were engaged in the business of ice-machine manufacturing long before they purchased these assets from you, were they not?

A. My recollection of it is, Judge, that they never were engaged

in that business except for the Consolidated Ice Machine Company ; they had manufactured machines for the consolidated company.

Q. They obtained leave from the assignee, when their claim for damages was presented, to complete these machines that were on their hands in an incomplete condition, and dispose of them for their own advantage?

A. That is my recollection ; yes, sir.

Q. In the completing of these machines they desired to use the patterns and drawings which they had in their possession, and were given that privilege after they had obtained the permission to complete and sell the machines which they had manufactured for the Consolidated Ice Machine Company before its failure?

A. That is my recollection ; yes, sir.

— The trustees never consented to have any manufacturing done on their account or for them by any one, did they?

A. No, sir.

Q. Nor was there anything further done than that parts of machines and castings made for ice-making machines were disposed of by the trustees with the view of ending their trust?

A. That was all. Our idea was to sell off all the machinery and all tools and appliances that were in the plant at that place on 18th street, and realize the sixty-nine thousand some odd dollars for which we had bought the plant.

Q. Do you not also recall, Mr. Knight, that Mr. Jenkins, the assignee of the Consolidated Ice Machine Company, carried on the business of the company for a number of months, completing the uncompleted contracts, finishing machinery that had been begun by the insolvent before it made the assignment?

A. Yes, sir.

Q. Isn't it the fact that all the machinery that was in an incomplete state, and which the Consolidated had begun before its assignment, was thus completed by the assignee?

107 A. Yes, sir, I think that is right.

Q. And all this occurred before the sale of the plant was made to the trustees by Mr. Jenkins?

A. Yes, sir.

Redirect examination :

Q. You consented to the use by Featherstones, while you held the title and they only a conditional title, of the patterns and drawings, didn't you?

A. Yes, sir.

Signature of witness waived.

NOVEMBER 5, 1896.

ROBERT E. JENKINS, a witness called on behalf of defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. ALDRICH:

Q. Please state your name, residence and occupation?

A. Robert E. Jenkins; Chicago; lawyer.

Q. You were the assignee of the Consolidated Ice Machine Company, I believe?

A. Yes, sir. Am still.

Q. As such there came into your possession certain stock of that corporation; how much, Mr. Jenkins?

A. What stock do you refer to?

Q. Capital stock of the Consolidated Ice Machine Company.

A. I don't think any capital stock ever came into my possession, I have no recollection of any.

Q. I see by one of your advertisements of sale, that you offered \$50,000 of the capital stock for sale?

A. That related to what was known as the Bushnell stock. I had forgotten it was ever offered for sale. And I still do not remember of ever having seen a certificate of that stock. There was a claim that there was \$50,000 of stock belonging to one Bushnell, which might be regarded as an asset of the company. My recollection is that the county court decided, when that matter came before it, that that was not an asset and couldn't be sold.

Q. In your advertisement for bidders, and notices, you offered not \$50,000 but \$100,000 of stock for sale; \$50,000 of the stock was that which you have described, known as treasury stock, but which you stated in your advertisement had never been issued, and \$50,000 par value of capital stock subscribed for by Mr. W. B. Bushnell, but upon which subscription only partial payment was made, and said stock was forfeited for non-payment of balance.

A. It relates to the whole Bushnell stock.

Q. Making a total of \$100,000?

A. That is right, yes, sir, but the facts I have stated with reference to it, as nearly as I recollect them, are correct as to the whole \$100,000; the county court ruled that it was not to be sold and it never was sold.

Q. That ruling was with reference to treasury stock only?

A. In reference to the whole stock which I advertised.

Q. With reference to the—

A. To all that I advertised, none was ever sold.

Q. But you say that ruling applied to the whole of it, or only to the \$50,000 that was never issued and was treasury stock?

A. It applied to the whole of it.

Q. About when was that ruling made?

A. Well, that was in the summer or fall of 1891, I have forgotten exactly. It was when the question of selling the assets was pending—summer or fall of 1891.

Q. How early in this matter did you make the acquaintance of Judge Rassieur?

A. On the day the assignment was made, October 14, 1890.

Q. What efforts were made, if you know, by him, in connection with yourself, or in which you participated, to make a sale or disposition of the assets of the Consolidated Ice Machine Company?

A. I don't think any efforts were made by me in connection with him to sell the assets.

Q. I call your particular attention to efforts made by yourself and Mr. Koenigsberg to sell the assets to the Pennsylvania Iron Company; when was that?

A. That was, I should say, in the summer of 1891, and was conducted, so far as I know, by Mr. Koenigsberg. I think I called on the Pennsylvania Iron Company at one time, in Philadelphia, and I have an impression that a representative of theirs came to Chicago and called upon me perhaps two or three times, but I don't think I ever saw Mr. Rassieur in connection with it, and I am not sure I ever did Mr. Koenigsberg, although I had correspondence with Mr. Koenigsberg about it, and he brought the matter to the Pennsylvania Iron Company's attention.

Q. You don't mean to say that Judge Rassieur was not participating in that effort to make the sale to the Pittsburg iron works?

A. I do not know that he was, he might have been.

Q. When was it first determined that that effort was unsuccessful; at what date?

A. O, I couldn't say that; so far as I knew anything about it, it was a mere inchoate negotiation, it never developed into anything that I regarded as serious.

Q. Did the Pennsylvania iron works make an offer for the property?

A. I don't remember now, if they did it was so small that I regarded it as insignificant. I don't recall that they ever made an actual offer.

109 Q. What was the total indebtedness of the Consolidated Ice Machine Company?

A. About \$550,000.

Q. What have you paid on account of that indebtedness?

A. Seventy-two per cent.

Q. About what will the estate unadministered pay?

A. O, probably not more than 3 per cent. or in that neighborhood, 3 or 4 per cent. probably. That would make seventy-five. That of course can't be estimated yet.

Q. The estate has been wisely and economically administered, in your opinion, I presume?

A. In my opinion it has.

Q. Have you the custody of the capital-stock book of this corporation?

A. Just what do you refer to?

Q. I refer to the certificate book.

A. I cannot find it this morning, so that I assume it is not in my

custody. I had the impression that Mr. Knight had it, but he tells me that he has made a search and does not find it.

Q. Have you the stock ledger?

A. I don't think there was a stock ledger; there may have been, but I don't remember of any.

Q. Have you the record book of the directors and stockholders?

A. I have.

Q. Have you produced it?

A. It is here, yes, sir.

Mr. RASSIEUR: Did you not send the certificate book to St. Louis at my request?

A. My recollection is, as to the stock-certificate book, that it was sent to St. Louis at the request of the attorneys engaged in this case, or upon their stipulation by me, but to whom it was addressed I do not now remember.

Mr. ALDRICH: I offer in evidence, if the master please, the record of the directors and stockholders of this corporation, showing all of the meetings from the date of its incorporation, including a copy of the certificate of incorporation, to October 14, 1890, as Defendants' Exhibit 10.

Q. I will ask the witness to state whether the pages that I have included are all that appears in said record book?

A. They are.

It is stipulated by counsel that the records just offered in evidence may be copied, and that the copy shall stand in lieu of the original, subject to any objections that might be made to the original, and the original retained by Mr. Jenkins.

Q. I will ask you, Mr. Jenkins, whether or not you have ever had any letters or telegrams from Judge Rassieur or from his firm relating to the sale or disposition of the assets of the Consolidated Ice Machine Company?

110 A. I made a search this morning, covering about four months—of September, October, November and December—which I found to be the time of the making of this sale, and brought such letters as I found that I had received from Judge Rassieur during that time. In looking them over hastily since, I think there is one that related to the sale.

Q. To Knight and Butz or to the Featherstones?

A. To the sale of the assets, I think; the letter was written, as I remember it, before Knight and Butz had bid, but has reference to the disposition of the stock and plant.

Q. Will you kindly produce that letter?

A. It is possible there may be others among these. There is the one that Judge Rassieur sent, the only one that I find that seems to relate to the matter.

Mr. ALDRICH: I offer this letter in evidence as Defendants' Exhibit 11, which is as follows:

St. Louis, October 3d, 1891.

R. E. Jenkins, Esq., Chicago, Ills.

DEAR SIR: The creditors' agreement not yet having been sent to St. Louis for signature I am afraid that they will not be ready on Monday to make a bid for the plant or a bid for the whole assets. In such a case I hope you will exercise all your influence to postpone action on the Warrington bid until the creditors have been able to put in a bid.

Very truly yours,

LEO RASSIEUR.

Q. I will ask you, Mr. Jenkins, whether Mr. John C. De La Vergne ever received, so far as you know, any property belonging to the Consolidated Ice Machine Company, or acquired any title thereto?

A. Never, so far as I know.

Q. And is that answer true also as to the De La Vergne Refrigerating Machine Company?

A. Yes, sir.

Cross-examination:

By Mr. RASSIEUR:

Q. Isn't it a fact, Mr. Jenkins, that early in 1891 efforts were made by the stockholders and officers of the Consolidated Ice Machine Company to make a sale of their right or the company's right to the assets of the company in the hands of the assignee, subject to the rights of the creditors?

A. I don't know just what you refer to, Judge.

Q. Do you not recall that Mr. De La Vergne and the stockholders met in your office early in April, 1891, and there made a sale to Mr. De La Vergne and Mr. De La Vergne's company, of the assets of this insolvent, subject to the rights of creditors?

A. You refer to the contract signed with Mr. De La Vergne?

111 Q. The contract on which these suits are brought.

A. I don't know just the scope of that contract, possibly I may have seen it, I think I did perhaps read it at the time, but just what it covered, in addition to the capital stock—of course that was a trade between the stockholders and Mr. De La Vergne, to which I was not a party, and I simply encouraged it, so to speak, as a solution of the difficulties in which the Consolidated Ice Machine Company was involved, and the meetings were held in my office, but were carried on in an adjoining room and I was not present and am not familiar with the terms of that agreement.

Q. You gave all the information that was asked by the parties who were there engaged in making that contract?

A. O, certainly.

Q. I have called your attention to those meetings simply for the purpose of refreshing your memory that the discussions regarding a sale to the Pennsylvania Iron Company were of the same character, to sell the assets in the hands of yourself as assignee, subject to the rights of creditors; is not that the condition of things, upon reflection?

A. I think, upon reflection, Judge, that that is the fact, and that what I referred to in answer to Mr. Aldrich's question was an effort made subsequently to get them to buy the plant from me.

Q. From you as assignee?

A. There was, I think, some discussion with reference to the matter you speak of with the Pennsylvania Iron Company at that time.

Q. You know also, do you not, Mr. Jenkins, that Mr. De La Vergne and his company, in person or by agent, solicited contracts from the creditors of the Consolidated Ice Machine Company for a privilege to purchase claims at less than face value?

A. Yes, sir; I was tolerably actively connected with that also as a possible solution of the difficulties involving the company.

Q. Explain all that you observed of those efforts of Mr. De La Vergne and his company.

A. So far as I know, the efforts were on the part of Mr. De La Vergne. A large part of the business of the Consolidated Ice Machine Company was carried on at its New York branch. I went east, I think it was in May, 1891, with Mr. Skinkle, and while we were there, the matter to which you refer was taken up in the office of the New York branch, in New York city. I was not a party to those negotiations, and it did not involve the disposition in any way of the assets, but was present at various interviews between Mr. De La Vergne and Mr. Skinkle, and I believed at the time that that was a fair—would have been a fair adjustment, a fair disposition

112 of the affairs of the company, and it was on that account that when I came home the Featherstones and some of the Chicago creditors who were not favorable to selling the claims at that price, sixty cents, became very active in the county court with reference to defeating the carrying out of that scheme, and in which they charged that I was a party to it, although I was not, except to the extent that I have mentioned.

Q. Can you state how large a portion of the claims had been bargained for by Mr. De La Vergne or his company?

A. No, I cannot; there was a considerable number, but I do not remember.

Q. Do you know of efforts made by Mr. De La Vergne to borrow in this city, the money needed to pay for these assets, or these claims?

Mr. ALDRICH: I object to that unless he knows of his own personal knowledge.

Q. From Mr. De La Vergne, or in your capacity as a director of any banking institution in this city?

A. My recollection would be that whatever I know about that was of a general character. I think Mr. De La Vergne told me that he endeavored to interest the Merchants' national bank, which is a creditor of this estate, in the matter, but failed to do so. I have no recollection that he applied to the bank with which I am connected.

Q. Do you not also recall that he at some interview claimed to

have had the promise of Mr. Bushnell and Mr. Wainwright and Mr. Nolker of St. Louis to purchase stock in his concern on the new basis on which it was to have been organized after the purchase of the assets of the Consolidated Ice Machine Company, subject to the rights of the creditors?

A. I don't recall that now.

Q. You were ready at all times, were you not, to turn over the assets of the Consolidated Ice Machine Company, under the laws of the State, to any one who acquired the rights of the Consolidated Ice Machine Company, and who secured such consent (*was*) was required under your law to returning the assets to the assignor or his assigns?

A. I was, of course, ready at all times to do what the county court might direct me to do.

Q. Do you recall the value of the plant as estimated at the time or shortly after the time that you took charge thereof?

A. I do not recall it from memory; I could only answer that by referring to the papers.

Q. What was the plant that was disposed of to the trustees in October, 1891, valued at? (Showing witness paper.)

A. In my inventory I valued it at \$100,000.

Q. And you did not take into that account the remnants of castings and stock that remained on hand, did you?

113 A. The stock on hand was a different item.

Q. That is not included in that \$100,000?

A. No, sir; not included in the \$100,000.

Q. You have not stated how many thousand dollars those castings and drawings and patterns were valued at?

A. I have the amounts here.

Q. Will you state?

A. In this inventory the stock on hand, manufactured and in process of manufacture, taken upon the basis of original cost, without deductions, as per an itemized inventory which I had, was \$76,107.44.

Q. But it was a fact, wasn't it, Mr. Jenkins, that out of that stock you used quite a large amount in manufacturing, or rather, completing such machines as were in course of manufacture at the time you took charge?

A. About \$50,000 worth probably.

Q. There is no valuation of patterns or drawings in the figures you have given here?

A. No, sir.

Q. Can you state what the pattern and drawing account of the company was at the time you took hold of the assets?

A. I do not remember; I don't know that I ever referred to it.

Redirect examination:

Q. The prices fixed by you in your inventory were not realized when you came to administer the estate?

A. No, sir.

Q. There was a large falling off, was there not, Mr. Jenkins?

A. I could only answer by knowing definitely just how much of this stock on hand remained undisposed of at the time of the sale to Knight and Butz, that included the item which I have here at \$100,000, and whatever remained of that stock on hand, which I see was probably 20 or 25 thousand dollars' worth.

Q. In some of your reports, if I recollect correctly, you state the total is \$130,000. You sold what was valued at \$130,000 for \$69,500?

A. That would be about right. I said there was probably about \$25,000 of this stock—would be about \$30,000, according to that. That is about right. I remember that we had used up in round numbers, nearly \$50,000 of the material on hand in completing our contracts, and whatever was left with the plant went in the sale to Knight and Butz.

Signature waived.

Adjourned to November 6, 1896, at 11 o'clock a. m.

NOVEMBER 6, 1896.

Met pursuant to adjournment.
Present, as before.

114 E. J. THOMAS, a witness called on behalf of defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. ALDRICH:

Q. You may state your name.

A. E. J. Thomas.

Q. Where do you reside?

A. 765 West Chicago avenue.

Q. How long have you been a citizen of Illinois?

A. Since '54.

Q. What relations, if any, did you sustain to the firm of John Featherstone's Sons during the period of 1890, and subsequent years?

A. I was general manager of the firm.

Q. For what period, Mr. Thomas?

A. From the spring of 1890, I think, I won't be positive, until '94.

Q. As such manager what relations did you sustain to the trouble that grew up with reference to the Consolidated Ice Machine Company's affairs? Did you have the management of that matter or not?

A. I had absolute control of all the business of John Featherstone's Sons while there; that was the condition.

Q. Including that matter?

A. Including all the transactions of the firm, yes, sir; I went there on the condition that I should have absolute control of the business.

Q. John Featherstone's Sons were large creditors I believe of the Consolidated Ice Machine Company?

A. Yes, sir; they were. They owed us at the time of the assignment about \$86,000.

Q. That firm became the purchaser of a portion of the assets of the Consolidated Ice Machine Company, I believe?

A. Yes, sir.

Q. I hand you what purports to be a copy of the contract by which you purchased certain assets of Messrs. Knight and Butz, trustees for certain creditors; I ask you to look at the contract and to state whether or not it is a copy.

A. Yes, sir.

Mr. ALDRICH: The writing shown to witness and by him identified is Defendants' Exhibit 8, being contract of the 30th day of January, 1892.

A. Yes, sir; this is a copy of the trust agreement.

Q. Not of the trust agreement, but of the contract by which you purchased, is it not?

A. By which the trustee purchased for us, as I understand.

Q. No, I think not.

A. Well, the trust was formed and authorized by us to make those purchases for us.

Q. This is the agreement that you are thinking of, Mr. 115 Witness. (Handing witness copy of Exhibit 5, being the contract creating the trust, bearing date the 9th day of October, 1891.) The last paper shown you is the trust agreement, of which you were thinking, is it not?

A. Yes, sir, I guess it is.

Q. And I call your attention again to the paper dated January 30, 1892, and ask you whether or not it is a true copy of the paper?

A. Yes, sir.

Q. By which John Featherstone's Sons purchased of the trustees for the creditors, the assets therein referred to?

A. Yes, sir.

Q. Are you able to state, Mr. Thomas, at what time you availed yourself of the option that is contained in that contract, and made the payment by which you acquired the absolute control of the property of the company on or before October, 1892?

A. Well, I can't say positively when we made those payments. It has been so long ago, and not having given the thing any consideration at all, I haven't called it to memory. The assignment was made on the 13th of October, 1890, I believe, and I am satisfied it was about a year afterward that we made those purchases, but I don't remember the conditions on which the payments were made, exactly.

Q. By looking at that agreement—look at it, please, and see whether or not that agreement was carried out.

A. If I would look at this carefully it would bring it back to my mind.

Q. Do so.

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A. I remember all about this now, I think.

Q. Are you able to state about what time you made the payments by which the title became vested absolutely in you?

A. It was in October, 1892.

Q. Until that time, that is, from the date of the agreement in January, 1892, until October, 1892, the business was conducted as provided in that contract, was it not?

A. Yes, sir.

Q. I will ask you whether or not there came to your hands under this contract, any ice machines, or parts of ice machines as a part of the assets purchased under this contract?

A. Well, there was parts of ice machines, that is, not parts that would complete a machine, but parts that are used in the construction of ice machines. There was quite an amount of stock that was on hand at the time, that was used in the construction of ice machines, came to us.

Q. There were also patterns, as I understand the facts?

A. Yes, sir, all the patterns owned by the Consolidated Ice Machine Company previous to their assignment.

Q. And during this period of from January, 1892, until October, 1892, while you were operating under this contract, I will ask you whether you were engaged in the construction and sale of ice machines?

A. We were.

116 Q. And of the kind and pattern made according to the patterns of the Consolidated Ice Machine Company?

A. Yes, sir, both before and after.

Q. I believe, Mr. Thomas, that you took an active part in preventing an effort made by Mr. John C. De La Vergne to acquire the assets of the Consolidated Ice Machine Company?

A. Yes, sir, I did.

Q. Are you able to state what Mr. John C. De La Vergne offered for claims against that company?

A. Yes, sir, I can say what he offered myself and others that were interested with me.

Q. How much?

A. Sixty per cent.

Q. Of the face value of their claims as creditors of the Consolidated?

A. Yes, sir, exactly.

Q. He didn't succeed in buying the claims, did he?

A. No, sir, he did not.

Q. When did you first meet Judge Rassieur in connection with this matter?

A. Well, I am not positive, but I think in the spring of '92; I am not positive about that, however.

Q. I will call your attention to a meeting that was held just prior to the making of the contract of October 9, 1891, by which the creditors constituted Messrs. Knight and Butz their trustees. You recollect that there was a meeting of creditors to determine upon the policy of managing the assets of the company?

A. Yes, sir.

Q. At that meeting, you may state whether the advisability of forming a corporation to take over the assets of the Consolidated Ice Machine Company was discussed?

Mr. RASSIEUR: I object to that question as calling for incompetent and immaterial testimony.

The MASTER: I think the question may be answered.

A. It was talked about at the time, but nothing conclusive arrived at.

Q. I will ask you to state whether you met Judge Rassieur—

A. At that time?

Q. At that time.

A. Well, my impression is that I did not, at that time.

Q. You may state whether Mr. J. W. Skinkle was present at any of those meetings?

A. I think he was present at that meeting, in fact I am positive he was. Mr. Rassieur may have been there, but I don't remember having met him at that time.

Q. Well, do you still think you didn't meet him before the formation of that trust agreement of October 9, 1891?

A. Well, my impression is that I met him later when we were making an effort to settle the business of the trust. I think
117 it was afterward, I think it was in a consultation that was had between Mr. Knight and Mr. Butz and some of the other parties interested that signed the trust, that is my impression.

Q. When you were creating—to sign the trust agreement?

A. No; afterwards. I refer to meeting Judge Rassieur, understand, in reference to this particular business. I had met him before that, but not in—I don't think, in reference to this consolidated business.

Q. Did you make such an investigation of the affairs of the Consolidated Ice Machine Company and its assets, as to enable you to state what their value was at that time?

A. What the assets of the company were worth?

Q. Yes.

A. Well, I did at the time investigate it thoroughly. That is I mean the assets now that are in Chicago. I didn't investigate what the assets were worth that were in other places where there was constructed machinery that was unpaid for, or anything of that kind. I simply consulted the assignee about that and got my information from him. But the value of the assets in Chicago I did investigate thoroughly, especially the stock and machinery and the patterns and drawings, &c., that they used here in their business.

Q. Those things that led to your bid under which you purchased the property?

A. Yes, sir; yes; I looked into that in detail, and formed a conclusion what they were worth to us.

Q. Was there any arrangement or agreement with reference to the management and sale of this property by John Featherstone's Sons that was not embraced in this contract of January 30, 1892?

A. No, sir; no agreement: That is, no written agreement. There was a verbal agreement that we should be allowed to purchase any of the stock that we wanted at the prices put on it by the assignee, or by his clerk, that is all. For instance, we wanted some particular piece of a machine that they had already manufactured, and it was for their interest to sell it, and they had it catalogued, and we wanted to take it at their price. I had an understanding with the assignee that we could take anything that they had there, and have it charged to us at the catalogued price.

Q. I see in the list of people who signed the trust agreement of October 9, 1891, that Featherstone's Sons are down for \$135,896.36; did that include a part of the Crane claim?

A. Yes, sir; it did; amounted to about \$45,000, that is, our share of the Crane claim; \$46,000.

Q. Mr. Clarence A. Knight was the attorney for the Featherstones in this matter, I believe?

A. Yes, sir.

Q. Are you able to state at what price the trustees purchased the claims of other creditors, on an average?

118 A. Well, about 40 per cent.

Q. Your company had been engaged in building machines for the Consolidated Ice Machine Company prior to its failure?

A. Yes, sir.

Q. And you had a number of machines on hand concerning which you had a dispute with the assignee at the time of the failure?

A. Yes, sir.

Q. What was the arrangement by which those machines were disposed of?

A. Well, we made no arrangement with the assignee at all. I took the responsibility of putting those machines up and selling them to outside parties the same as if we had no contract with the Consolidated Company. In other words, there was no contract made for a special machine. We were to build so many of certain sizes for the Consolidated Company, and none of those had been delivered up to that time under that contract, and when they failed I completed the machines and sold them the same as if we had built them originally ourselves.

Q. Applying the proceeds on the contract, I presume, that was to be paid by the Consolidated Ice Machine Company?

A. Yes; we had no charges against the Consolidated Ice Machine Company on that account, understand. But the assignee wanted two or three of the machines, I think three, afterwards, perhaps—well three or four to complete contracts that the Consolidated Company had at the time of the assignment, and we sold those machines to the assignee the same as we would make a sale to any one. In other words, we didn't attempt to hold the assignee or the Consolidated Ice Machine Company to their contracts for those sixteen machines, at all.

Cross-examination.

By Mr. RASSIEUR :

Q. As I understand you, Mr. Thomas Featherstone's Sons were engaged in the business of constructing ice machines before the Consolidated Ice Machine Company made its assignment ?

A. Yes, sir.

Q. It was doing this business in its own firm name ?

A. Yes, sir.

Q. It continued the business of constructing and selling ice machines and finishing them after the assignment, as it had done theretofore, in its own name ?

A. Yes, sir.

Q. The firm of John Featherstone's Sons never held out to the world that it was acting as the agent of the parties to the trust agreement, or as the agent of the trustees under that agreement ?

A. No ; we never claimed that we were acting for any one but ourselves.

Q. In your advertising, and in the work of soliciting orders, the business was done solely in the name of the firm of John Featherstone's Sons, and all contracts that were obtained, 119 were obtained for them and for no one else, is that not so ?

A. No, we obtained no contracts for any one but ourselves ; we were doing business for ourselves.

Q. And you didn't advertise any one else as being your principal, and that you were merely acting as an agent in the doing of the business that was done after October 14, 1890 ?

A. We did not.

Q. The assets which were purchased by you from the trustees, Messrs. Knight and Butz, were such as were left over after the assignee of the Consolidated Ice Machine Company had finished such contracts as he concluded to fill, of the Consolidated Ice Machine Company, were they not ?

A. No, sir. The assignee has not completed a number of contracts that the Consolidated Ice Machine Company had taken, and they were incomplete at the time we made our purchase.

Q. My question was, that that which remained on hand was merely such property as was not used by the assignee in completing such contracts as he chose to fill, and obtained orders from the county court for the completion of ?

A. Yes, I understood your question. I say no, because there was a number of contracts finished after the time that that purchase was made—a number of the contracts finished by the assignee after that purchase was made.

Q. Can you mention any such contracts, Mr. Thomas ?

A. Well, the contract of Trenton was not finished, you know, at the time that purchase was made.

Q. Do you mean to say that in January, 1892, a year and three months after the making of the assignment, the Trenton contract was not finished ?

A. I think not, sir, that is my recollection of it. And there was one also in Memphis, I think, that was unfinished.

Q. Did you ever see the plant at Trenton?

A. No, sir, I think not.

Q. Then, when you say it was not finished, you are giving impressions received from others?

A. I am simply making the statement here that the assignee made to me.

Q. And if that plant was finished, you are simply mistaken as to the time when it was completed?

A. I am simply—no, the assignee was mistaken. I am simply stating what he told me, that is all. I understood from him that the plant was unfinished.

Q. Did you ever see the Memphis plant?

A. Well, I won't be positive about that; I was in Memphis so many times I can't say; I never went there to see it.

Q. At what place was that plant constructed, or for what corporation?

120 A. Well, it was put in for a brewing company, I don't remember the name of the company now.

Q. Was it the Tennessee Brewing Company, for which the plant was constructed?

A. I wouldn't be certain.

Q. Your information concerning the completion of that plant was also then derived—

A. From the assignee, yes, sir, in talking with him. I didn't go there to examine it. I was in Memphis while it was being put in, but I took so little interest in it, I don't even remember now whether it was put in for the Tennessee Brewing Company or not, although I know nearly all those people, and I was down there at the brewery at one time while visiting Memphis, and some of the men connected with it told me they were putting in a new plant, and I didn't even take the trouble to inquire what kind of a plant they were putting in, or whose plant it was, at that time, because I wasn't interested in the—that wasn't my business then.

Q. You have stated before that there were no unfinished machines among the assets which were purchased by the firm of John Featherstone's Sons from the trustees.

A. Yes, sir. There was parts of machines, understand, but no unfinished machines; no machines that could be completed with the material that was there, by putting it together.

Q. There were only such parts as could be used in the construction of a machine?

A. Yes.

Q. In addition to the tools and implements required for the construction of machines?

A. Yes, sir.

Q. And you purchased such parts as you required in the construction of your machines from the assignee, under an arrangement with him, whereby the firm you represented was to pay the catalogue prices therefor?

A. Yes, sir.

Q. Do you remember the giving of notes by the firm of John Featherstone's Sons for part of the purchase price mentioned in this agreement of January 30, 1892?

A. We gave a note of \$5,000, I believe.

Q. Were there not other notes given long before October, 1892?

A. I don't recollect any. I think we gave—yes, I think we gave notes for \$7,000, but I won't be positive what those notes were given for, but my impression is now that the \$5,000 note was given as a part of the payment on the purchase of that plant.

Q. Is it not a fact that before October, 1892, the purchase of the material and merchandise bought by your firm was closed, by the giving of notes which were thereafter paid in order to save you the trouble of keeping the account which was provided for in this agreement of purchase?

121 A. Well, I don't recollect anything of that kind. It seems to me if that was so I would recollect it. My impression is that the assignee simply sent his accounts to us and that we satisfied them as we did other ordinary accounts—book accounts. That is my impression.

Q. You are now speaking of the accounts of the assignee for merchandise sold to John Featherstone's Sons?

A. Yes, sir.

Q. I am speaking of what was done after the trustees had bought the merchandise and machinery and tools and had sold the same to the Featherstones' firm under the contract of January 30, 1892?

A. Well, I thought you referred to the property purchased from the assignee. We made two purchases, first from the assignee, then from the trustees. We bought anything in material that we wanted from the assignee previous to the purchase by the trustees, then we bought from the trustees the whole plant.

Q. And in the settlement of the purchase of the whole plant did you not conclude to give notes to the trustees in order to eliminate the obligation which you had assumed, to keep an account of all sales made by you of portions of the property that had been turned over to you?

A. I have no recollection of us giving but that \$5,000 note, that is all I recollect.

Q. Have you any recollection of taking the property and selling it as your own, with the consent of the trustees, immediately after the purchase of January 30, 1892?

A. It wasn't turned over to us immediately after the purchase, but there was conditions in that contract that had to be complied with, and it remained in the custody of the representative of the trustees, of the assignee. Young Skinkle was there and had the custody of the property for some time afterward.

Q. So far as your recollection goes then, it remained in the custody of the agent of the trustees until you complied with your obligation under that contract?

A. That is it, yes, sir; that is my impression. That is, I took it for granted that he represented the trustees, although he was the

representative of the assignee there at the shops. Seemed to be his custodian.

Q. He remained in charge of the property after the sale to the trustees, as he had been in charge during the time that he was acting for the assignee?

A. Yes, sir; until the trustees turned it over to us, then he surrendered it to us.

Q. In the making of the trust agreement you also recall, do you not, that any creditor of the Consolidated Ice Machine Company
122 was invited to become a member of that trust agreement?

A. Well, I take it for granted that they were, but I couldn't say that they were, it was my understanding with Mr. Knight that they should be, when that trust was formed.

Q. Do you recall the fact that every creditor was offered by the trustees, either an opportunity of becoming a member of the trust, or becoming a party to the trust agreement, or accepting forty per cent. of the claims in full of the purchase price thereof?

A. Well, I believe they were, but I can't say positively that they were. In other words, my understanding with Mr. Knight and with Mr. Butz was that they all should have an opportunity of joining the trust, or taking forty cents on the dollar, and I believe that proposition was made to all of them, but I don't know it.

Q. Did you meet Mr. Guernsey, of the De La Vergne Refrigerating Machine Company at any time prior to April 16, 1891, in connection with the Consolidated Ice Machine Company's affairs?

A. Mr. Guernsey?

Q. Mr. Guernsey.

A. No, sir; I don't know anything about Mr. Guernsey that I have any recollection of.

Q. Did you meet Mr. Waters?

A. Yes, sir.

Q. As agent of the De La Vergne Refrigerating Machine Company, in the city of Chicago, at any time while he was attempting to purchase claims against the Consolidated Ice Machine Company?

A. Well, I don't know; I have met him in the city of Chicago, he came to my office—called on me.

Q. Was he the one who endeavored to prevail upon you to sell the claim of John Featherstone's Sons against the Consolidated Ice Machine Company for sixty per cent. of its face value?

A. Yes, sir.

Q. He was acting, or claimed then to be acting for the De La Vergne Refrigerating Machine Company?

Mr. ALDRICH: I object to that; a declaration of an agent as to his authority, is not competent or material.

The MASTER: I think the question may be answered.

A. He stated to me that he was authorized by Mr. John C. De La Vergne to offer us sixty cents on the dollar for our claim.

Q. Do you remember any statement that he made with reference

to the number of claims that he had already contracted for at that time?

123 A. I don't recollect the claims that he represented that he had contracted for, but he did represent that he had contracted for claims for the De La Vergne Refrigerating Machine Company.

Mr. ALDRICH: I move to strike out the latter part of the answer, "for the De La Vergne Refrigerating Company," on the ground that the company can't be bound by the declarations of a person that he is its agent.

Redirect examination:

Q. What was the business of John Featherstone's Sons prior to 1890?

A. Just the same as it is now; they run a factory, made railroad castings and castings of every character, with the exception of car wheels; they run a large machine shop and manufactured special machinery and ice machinery. In other words, we would manufacture anything that we could contract for in the shape of machinery that we saw a profit in.

Q. My aim was, Mr. Thomas, to ascertain whether or not you had been building ice machines prior to your connection or contracts with the Consolidated Ice Machine Company, and if so, for what company?

A. Yes, sir. Well, we built a number of machines for, not a company, I guess, but for parties of the same name as a pump——

Q. O, the Boyle——

A. We built the Boyle machine for the Boyle company; I couldn't say whether that is an incorporated company or not.

Q. It is a fact, isn't it, Mr. Thomas, that after you purchased the assets of the Consolidated Company under the contract of January 30, 1892, you advertised that you had become such purchasers?

A. Yes, sir; O, yes.

Q. So that you want to make that qualification, I suppose, to the general question which Judge Rassieur asked you, that you went on as before doing business in the name of John Featherstone's Sons; you did advertise the fact that you——

A. O, we advertised the fact of the purchase. The question the judge asked me was simply if I advertised in our own name—certainly we did, but we advertised that we had acquired the property and the patterns and the drawings, &c., of the Consolidated Company, and that we were now manufacturing that machine under those rights that we acquired.

Q. And you speak also of a delay occurring; that was only while you were closing up and making your arrangements to take the plant, and so on and so forth? It wasn't a long delay after January 30, before you were put into possession, was it?

124 A. No, the arrangement was all satisfactory to us; that is, really everything that had been agreed by the trustees was done, and more than done. I think that they put us in possession of that property before we had the right, under that agree-

ment, really. That is, by the character of the agreement, we had to make certain payments after selling the property, before the rest of it was to come into our possession, and I think it was really put into our possession sooner than we had a right.

Q. I believe the evidence has already disclosed that you had the patterns and part of the property prior to the execution of this agreement?

A. We had a number of their patterns and their drawings prior to the assignment, and held them from the time of the assignment until they were turned over to us under the sale from the trustees.

Q. Did you do any work after the sale of January 30, 1892, for the assignee, towards completing contracts that the assignee had on hand?

A. After 1892?

Q. After January, 1892, when you made this purchase?

A. Yes, I am under the impression that we did, but they were only small jobs you know, to finish up some little contract that was perhaps left unfinished, or where the original agreement hadn't been complied with probably, where they may have made changes.

Q. I understand, Mr. Thomas, that you took this property under the contract of January 30, 1892, proceeded to do business as provided in that contract, up till the time that you made the payments provided for by the contract?

Mr. RASSIEUR: I object to that question as leading.

A. Yes, sir.

Q. I ask you to state whether or not this understanding as expressed by me is correct, and what you mean to be understood by your testimony?

Mr. RASSIEUR: I object to the question as leading; as calling for a conclusion.

A. Well, my understanding is that the property was turned over to us according to the agreement.

Q. And my question goes a little farther, Mr. Thomas, and asks you whether or not you received it and administered it according to the agreement, until you had completed your payments?

Mr. RASSIEUR: I object to that question as being improper, because counsel can ask for what was done but not as to whether it was done in accordance with an agreement.

A. I think so; we endeavored to do so.

Q. So far as you know there was never any complaint that you violated that agreement, was there?

125 Mr. RAISSIEUR: I object to that as being entirely immaterial.

A. I never heard of any.

Signature of witness waived.

Adjourned to 1.45 o'clock p. m.

1.45 p. m.—Met pursuant to adjournment.

Present, as before, Mr. Mathias representing Mr. Aldrich.

It is stipulated that the inventory of the assets of the Consolidated Ice Machine Company made by its assignee, Robert E. Jenkins, may be introduced in evidence upon the hearing of the cause by either party if he shall so desire, subject to any objection as to competency, materiality and relevancy.

Mr. Butz, one of the trustees in the trust agreement, having produced the original, Exhibit 8, and it having been carefully compared with the copy offered in evidence, and said copy having been made to conform exactly to the original, it is stipulated that said copy may be received in evidence in lieu of the original, subject to all objections which might be made to the original; and it further appearing that upon the original there was a memorandum which was not upon said copy, such memorandum is made a part of said Exhibit Number 8, and it is as follows:

"I hereby consent to the within, and consent also to the sale of said property by either of said parties hereto.

ROBERT E. JENKINS,

Assignee of Consolidated Ice Machine Company.

January 30, 1892.

APRIL 9, 1892.

This agreement has been cancelled and satisfied, said Featherstones having given their notes as follows one for \$5,000; one of \$7,375 and one of \$32,375.

JOHN FEATHERSTONE'S SONS,

Per E. J. THOMAS, *Manager.*

CLARENCE A. KNIGHT,

OTTO C. BUTZ, *As Trustees."*

MR. RASSIEUR: Mr. Butz brings as one of the original papers under which the transfer of the assets bought by him and his co-trustee, Knight, from the assignee, R. E. Jenkins, Esq., was transferred to the firm of John Featherstone's Sons, the bill of sale, which he offers in evidence as Defendants' Exhibit 12. It is as follows:

Know all men by these presents, that we, Clarence A. Knight and Otto C. Butz, trustees under a certain agreement made by certain creditors of the Consolidated Ice Machine Company, of the city of Chicago, county of Cook and State of Illinois, party of the first part, for and in consideration of the sum of sixty-nine thousand seven hundred and fifty dollars (\$69,750.00), lawful money of the United States of America, to us in hand paid at or before the ensembling and delivery of these presents by John Featherstone's Sons, a corporation, also of said city of Chicago, party of the second part, the receipt whereof is hereby acknowledged, have sold, assigned, transferred and delivered, and by these presents, do hereby sell, assign, transfer and deliver unto said John Featherstone's Sons all the following goods, chattels and property, to wit:

All of the manufacturing plant of the said The Consolidated Ice

Machine Company, including all machinery, tools, patterns, drawings, fixtures and furniture of every name and nature; also, the good will of the business of the said The Consolidated Ice Machine Company; and also, all merchandise, stock on hand, including also all tools, furniture, fixtures, and unused stock, being the same property sold, assigned and transferred to the said party of the first part by R. E. Jenkins, assignee of the Consolidated Ice Machine Company, and of which said plant and stock said John Featherstone's Sons have prior to this date had possession and control, to have and to hold the said goods, chattels and property unto the said party of the second part, its successors and assigns to and for its own proper use and behoof forever.

In witness whereof the undersigned have hereunto set their hands and seals, this eighth (8th) day of April, A. D. 1892.

CLARENCE A. KNIGHT, [SEAL.]
OTTO C. BUTZ, *As Trustees*. [SEAL.]

Mr. RASSIEUR: Mr. Butz also asks me to present here an original paper which was obtained from Robert E. Jenkins, assignee, in connection with the transfer made to the trustees by the assignee, indicating a possible change in the purchase price.

Mr. MATHIAS: Objected to on the ground that it doesn't show that it is a bill of sale.

Said paper is as follows:

Whereas, Robert E. Jenkins, as assignee of the Consolidated Ice Machine Company, has this day made, executed and delivered to Clarence A. Knight and Otto C. Butz, as trustees for certain creditors of the Consolidated Ice Machine Company, the Consolidated Ice

Machine Company's plant, including all items mentioned in
127 the inventory made by said assignee and all patterns, drawings and tracings heretofore owned by the Consolidated Ice Machine Company.

Now therefore, it is understood and agreed by and between said Robert E. Jenkins, assignee, as aforesaid, and Clarence A. Knight and Otto C. Butz, as trustees, aforesaid, that the patterns, drawings and tracings shall be checked, and in case any are missing, and said assignee unable to turn the same over to said trustees, then the matter shall be submitted to the Honorable Frank Scales, judge of the county court, to determine what deduction, if any, should be made on account of said patterns, drawings and tracings that said assignee is so unable to deliver.

This checking shall be done on or before February 1st, 1892. Otherwise no deduction shall be made.

In witness whereof the parties hereto have hereunto set their hands and seals this 8th day of December, A. D. 1891.

ROBERT E. JENKINS, [SEAL.]
Assignee of the Consolidated Ice Machine Co.
CLARENCE A. KNIGHT, [SEAL.]
OTTO C. BUTZ, *As Trustees*. [SEAL.]

Mr. RASSIEUR: Mr. Butz asks this to go in: That he requested all creditors of the Consolidated Ice Machine Company to become parties to the trust agreement of October 9, 1891, or to sell their claims to the trustees at forty per cent. of the face value.

Mr. MATHIAS: That may be a part of Mr. Butz's testimony.

WILLIAM G. ADAMS, a witness called on behalf of defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. MATHIAS:

Q. Where do you live?

A. Chicago.

Q. What is your business?

A. Lawyer.

Q. Have you had any connection with the Consolidated Ice Machine Company in this matter?

A. At the time (of) this trust agreement was entered into I was clerk in the office of Knight and Butz, and I assisted Mr. Knight in his management of the trusteeship.

Q. Do you know of your own personal knowledge concerning the payments made by the John Featherstone's Sons Company to the trustees in connection or in consideration of the assets of the Consolidated Ice Machine Company, which were transferred to them?

A. Yes, sir.

Q. You may state, if you please, what payments were made?

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A. On December 23, 1891, Clarence A. Knight and Otto C. Butz as trustees under the trust agreement advanced to John Featherstone's Sons the sum of \$2,000 on account of dividends that would afterwards accrue to them. By the contract that was entered into between the trustees and John Featherstone's Sons, Featherstones agreed to buy the plant for a purchase price of \$69,750. On March 2, 1892, John Featherstone's Sons paid to the trustees in cash, \$5,000. On April 8, 1892, the trustees declared a dividend of forty per cent. to the creditors in the trust agreement. The dividend that Featherstones were entitled to, amounted to \$54,358.53; the trustees paid them at that time on account of that dividend in cash, \$32,358.53, and retained the sum of \$22,000 which was to be applied on the amount due from Featherstones for the purchase of the plant, and also on account of the loan made to the Featherstones by the trustees, that left a balance due to the trustees from Featherstones, of \$14,750. For this amount the trustees took notes of John Featherstone's Sons, one note for \$5,000, which matured on May 5, 1892, one note for \$7,375, which matured October 1st, 1892, and one note for \$32,375, which also matured October 1st, 1892. On May 10, 1892, John Featherstone's Sons paid the trustees the first note which was due on May 5th, 1892, amounting to \$5,000. On October 18, 1892, the trustees declared a dividend of 13½ per cent. to the creditors in the trust arrangement; the amount that Featherstones were entitled to from this dividend amounted to \$18,346. This the

trustees retained on account of the balance of the purchase-money due on the plant, and they received on that day, October 18, 1892, the balance in cash, of John Featherstone's Sons, which was \$21,404.

Cross-examination.

By Mr. RASSIEUR:

Q. The last three amounts having been paid in satisfaction of the notes theretofore given on April 8, 1892, to the trustees?

A. Yes; that is, the first note was paid some time before. The first note was paid on May 10.

Q. The last three, you understand, having been received in payment or satisfaction of the three notes that had been theretofore given?

A. Yes, they paid those three notes.

Mr. RASSIEUR: Mr. Jenkins having made search, is unable to find a letter to which the letter written by Leo Rassieur to him and offered in evidence as Exhibit 11, might be deemed an answer.

Signature of witness waived.

It is stipulated by and between the parties hereto that they will proceed with the taking of testimony at the office of Mr. 129 Hubert A. Banning, Esq., in Temple Court building, in the city of New York, on Tuesday next, November 10th, at 10 o'clock a. m., without further notice.

In the Circuit Court of the United States for the Eastern District of Missouri.

GERMAN SAVINGS INSTITUTION

v.

DE LA VERGNE REFRIGERATING MACHINE COMPANY ET AL. }

Consolidated causes.

I, E. B. Sherman, master in chancery of the circuit court of the United States for the northern district of Illinois, do hereby certify that the foregoing testimony of Otto C. Butz, Clarence A. Knight, R. E. Jenkins, E. J. Thomas and William G. Adams, was taken before me as such master, by stipulation of counsel, at my office, rooms 1152, 1153 and 1154 Monadnock block, in the city of Chicago, county of Cook and State of Illinois, on the 5th and 6th days of November, 1896; that Hon. Leo Rassieur appeared as attorney for said complainant, and Hon. Charles H. Aldrich and Mr. F. W. Lehman as attorneys for defendant De La Vergne Refrigerating Machine Company; that said witnesses and each of them were first duly cautioned and sworn to tell the truth, the whole truth and nothing but the truth; that said testimony was, by stipulation of counsel entered into before the master, taken down in shorthand, and written out upon the typewriter, by Kate S. Holmes, a skillful

stenographer and typewriter operator; that the signatures of all witnesses were duly waived; that I am not of counsel for either party to this suit, or interested in the result thereof.

E. B. SHERMAN,

Master in Chancery of U. S. Cir. Ct., N. Dist. Illinois.

Master's fees for taking and certifying depositions (including stenographer's, etc.), marking exhibits and for subpoenas.....	\$114.70
Witness fees (p'd by def't).....	2.00
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	\$116.70

Gen'l No., 92682. People, etc., *vs.* The Consolidated Ice Machine Co. U. S. cir. ct., eastern dist. of Mo. German Savings Institution *vs.* De La Vergne Refrigerating Mch. Co. Defendants' Exhibit 1. E. B. Sherman, master.

UNITED STATES OF AMERICA.

STATE OF ILLINOIS, }
Cook County, } ss:

Pleas before the Honorable Thomas G. Windes, one of the judges of the circuit court of Cook county, at a term thereof begun and held in the court-house, at Chicago, in said county and State, on the third Monday (being the 19th day) of March, in the
130 year of our Lord one thousand eight hundred and ninety-four, and of the Independence of the United States the one hundred and eighteenth.

Present: Honorable Thomas G. Windes, one of the judges of the circuit court of Cook county, State of Illinois.

Jacob J. Kern, State's attorney.

James H. Gilbert, sheriff.

Attest: FRANK J. GAULTER, *Clerk.*

Be it remembered, that heretofore, to wit, on the 30th day of June, A. D. 1891, a certain petition and a certain information in the nature of a *quo warranto* were filed in the office of the clerk of said court in the words and figures following, to wit:

(*Petition.*)

STATE OF ILLINOIS, }
County of Cook, } ss:

In the Circuit Court of Cook County.

To the honorable judges of said court:

Your petitioner, Joel M. Longnecker, respectfully shows unto your honors that he is the State's attorney in and for the county of Cook, and State of Illinois, aforesaid.

Your petitioner further shows unto your honors that on the 18th

day of July, 1884, Edmund Jungenfeld, Joseph Koenigsberg, and Leo Rassieur, applied to the Honorable Henry D. Dement, secretary of state of the State of Illinois, for a license to open books of subscription to the capital stock of the Consolidated Ice Machine Company, a corporation under and by virtue of an act concerning corporations, approved April 18, 1872, and all acts amendatory thereof, said corporation to have a capital stock of \$200,000.00, divided into two thousand (2,000) shares of \$100.00 each; that thereafter a license was duly issued by said secretary of state to said commissioners to open books of subscription, and thereafter, to wit, on the 27th day of September, A. D. 1884, said commissioners filed in the office of the secretary of state a report of their proceedings under said license, showing the subscription to the shares of the capital stock of said, The Consolidated Ice Machine Company as follows, to wit:

J. W. Skinkle	250 shares	\$25,000.00
W. B. Bushnell.....	500 "	50,000.00
E. Jungenfeld.....	300 "	30,000.00
Jos. Koenigsberg, per E. Jungenfeld, as attorney-in-fact.....	250 "	25,000.00
Leo Rassieur.....	200 "	20,000.00
W. B. Bushnell, as treasury stock....	500 "	50,000.00

Being in all 2,000 shares of the par value of ... \$200,000.00

131 And thereafter, to wit, on the 27th day of September, 1884, said Henry D. Dement, secretary of state, as aforesaid, issued a certificate that said The Consolidated Ice Machine Company, was a legally organized corporation under the laws of the State of Illinois, as it will more fully appear by reference to the record of said final certificate of incorporation, application for license and return of the commissioners, recorded in Book 34 of Corporation Records, page 229, to which your petitioner prays leave to refer, or to certified copy of said record, to be produced when and where this court may direct.

Your petitioner further avers that the five hundred (500) shares of the capital stock of said The Consolidated Ice Machine Company, subscribed by W. B. Bushnell, as and for treasury stock, was not a subscription of stock made in good faith; that neither the said Bushnell nor the other subscribers to said capital stock expected or intended that they or the said Bushnell should pay to the said corporation the sum of \$50,000.00 or any other sum for or on accounts of said subscription and that no other or different subscription was made for the capital stock of said corporation respecting said five hundred shares; that the same was never paid for nor was any amount whatever paid thereon or on account thereof, by any person whatsoever and that said five hundred shares of the capital stock of said, The Consolidated Ice Machine Company, have never been issued.

Wherefore your petitioner avers that the capital stock of said corporation was not originally and has not since been fully subscribed in good faith.

Your petitioner further avers that immediately after the issue of the certificate of final incorporation, said The Consolidated Ice Machine Company, commenced doing business as a corporation and has ever since and still is engaged in business as a corporation, but that it is insolvent and that its affairs are now being carried on, conducted and administered by Robert E. Jenkins, Esq., assignee, appointed as such by the county court of Cook county, Illinois, on the — day of October, A. D. 1890.

Your petitioner further avers that Jacob W. Skinkle, Edward Mallinckrodt, Leo Rassieur, Annie Jungensfeld, Frederick Widman, and P. J. Lingenfelder and Leo Rassieur, executors of Edmund Jungensfeld, deceased, and as trustees of Carl Jungensfeld, a minor, and the German Savings Institution, a banking corporation of the State of Missouri, as holders and owners of the entire issued stock of said, The Consolidated Ice Machine Company, on, to wit, 132 the 16th day of April, 1891, the said, The Consolidated Ice Machine Company, and the said stockholders aforesaid, sold to the De La Vergne Refrigerating Machine Company, a corporation of the city of New York, all their right, title and interest in and to the assets of the said The Consolidated Ice Machine Company, and the said stock and have delivered said stock to the said De La Vergne Machine Company, subject to the payment of its obligations and subject to the custody thereof in the legal custodian, Robert E. Jenkins, Esq., as aforesaid; and further agreed, as it is stated in said instrument conveying said assets, "for the purpose of placing the party of the third part (being said De La Vergne Refrigerating Machine Company) in complete control of said assets of the party of the first part (being said, The Consolidated Ice Machine Company), subject to the legal rights of the said assignee and creditors of said party of the first part, the said party of the second part (being said stockholders of the said, The Consolidated Ice Machine Company) agree- within ten days from the date hereof, to assign to said party of the fourth part (being John C. De La Vergne of the city of New York, president of the De La Vergne Refrigerating Machine Company), all the stock of said party of the first part which has been issued and which they guarantee has been paid in full."

And your petitioner avers that such sale and assignment of stock is in law a sale and assignment of the capital stock and of the assets of said, The Consolidated Ice Machine Company to said The De La Vergne Refrigerating Machine Company, a corporation, and that said latter corporation intends to enjoy the franchises granted to said, The Consolidated Ice Machine Company and to carry on and conduct its business as a corporation under and by virtue of the said purchase as aforesaid, and claims by virtue of such purchase to have succeeded to the rights and franchises of said, The Consolidated Ice Machine Company.

Whereupon the State's attorney prays the consideration of the court here in the premises and for leave to file information in the nature of a *quo warranto*, so that said, The Consolidated Ice Machine

Company, shall show by what authority it is exercising the privileges, franchises and functions of a corporation.

Respectfully submitted.

JOEL M. LONGNECKER,
State's Attorney.

KNIGHT & BROWN,
RUBENS & MOTT, *Of Counsel.*

133 STATE OF ILLINOIS, }
County of Cook, } ss:

Robins S. Mott, being first duly sworn, deposes and says that he prepared the foregoing petition from the records and proceedings of said corporation and from the knowledge and information obtained from matters concerning the assignment of said corporation, and from such information he states that said matters therein stated are true.

And further affiant sayeth not.

ROBINS S. MOTT.

Subscribed and sworn to before me this 30th day of June, A. D. 1891.

JOHN C. SHUBERT,
Clerk of Criminal Court, Cook County, Illinois.

Said writ issue returnable July 6th, 1891.

S. P. McCONRAD, J.

STATE OF ILLINOIS, }
County of Cook, } ss:

In the Circuit Court of Cook County, to the June Term, A. D. 1891.

THE PEOPLE OF THE STATE OF ILLINOIS <i>ex Rel.</i>	} <i>Quo Warranto.</i>
Joel M. Longnecker	
<i>vs.</i>	
THE CONSOLIDATED ICE MACHINE COMPANY.	

Joel M. Longnecker, State's attorney for said county of Cook, who sues for the people of said State in this behalf, comes into court here on this day, and for said people and in the name and by the authority thereof, gives the court here to understand and be informed that the Consolidated Ice Machine Company, for the space of five years last past and more in the county of Cook aforesaid, has used and still does use, without any warrant, charter or grant the following liberties, privileges, and franchises, to wit, that of manufacturing and selling ice-making and refrigerating machinery and all parts of such machinery, and acquiring, selling and using patents for such machinery and licenses to operate thereunder, and to manufacture and sell ice and establish and conduct cold-storage rooms and ice depots, and all of which liberties, privileges and franchises the said The Consolidated Ice Machine Company, during all the time aforesaid, upon the said people has usurped and still does usurp, to the

damage and prejudice of said people and against the dignity of the same.

Whereupon the State's attorney, for the said people and in the name and by the authority thereof prays the consideration
134 of the court here in the premises and due process of law in this behalf, to make the said The Consolidated Ice Machine Company answer to the said people of the State of Illinois by what warrant it claims to have used and enjoyed the liberties, privileges and franchises aforesaid.

JOEL M. LONGNECKER,
State's Attorney.

KNIGHT & BROWN,
RUBENS & MOTT, *Of Counsel.*

And afterwards, to wit, on the 6th day of July, A. D. 1891, a certain demurrer was filed in the office of the clerk of said court in the words and figures following, to wit:

(*Demurrer.*)

STATE OF ILLINOIS, }
Cook County, } ss:

In the Circuit Court of said Cook County.

THE CONSOLIDATED ICE MACHINE COMPANY
ats.

THE PEOPLE OF THE STATE OF ILLINOIS *ex Rel.* JOHN M. LONGNECKER, State's Attorney. }

And the defendant, by Ephraim Banning, its attorney comes and defends, etc., when, etc., and says that the said petition and the matters therein contained, in manner and form as the same are above set forth, are not sufficient in law for the petitioner to maintain his aforesaid action, and that it, defendant, is not bound by law to answer the same; and this it is ready to verify.

Wherefore, for want of a sufficient petition in this behalf, defendant prays judgment and that the said writ of *quo warranto* may be quashed, and that said petition- may be barred from maintaining his aforesaid action, etc.

EPHRAIM BANNING,
Att'y for Def't.

Be it remembered, that on, to wit, the 16th day of July, A. D. 1891, the following among other proceedings were had and entered of record in said court, to wit:

Whereupon the State's attorney for the said People and in the name and authority thereof prays the consideration of the court here in the premises and due process of law in this behalf to make the said The Consolidated Ice Machine Company answer to 136 the said People of the State of Illinois, by what warrant it claims to have used and enjoyed the privileges, liberties and franchises aforesaid.

JOEL M. LONGERNECKER, and

State's Att'y.

KNIGHT & BROWN AND

RUBENS & MOTT, *Of Counsel.*

Second Count.

And the said Joel M. Longernecker, State's attorney as aforesaid, gives the court here to understand and be informed further, that, on the 18th day of July, 1884, Edmund Jungensfeld, Joseph Keonigsberg and Leo Rassieur applied to the Honorable Henry S. Dement, secretary of the State of Illinois, for a license to open books of subscription to the capital stock of the Consolidated Ice Machine Company, a corporation, under and by virtue of an act concerning corporations approved April 18th, 1872, and all acts amendatory thereof, said corporation to have a capital stock of two hundred thousand dollars (\$200,000.00) divided into two thousand shares of one hundred (\$100) dollars each; that thereafter a license was duly issued by said secretary of state to said commissioners to open books of subscription, and thereafter, to wit, on the 27th day of September, A. D. 1884, said commissioners filed in the office of the secretary of state a report of their proceedings under said license showing the subscriptions to the shares of the capital stock of the said The Consolidated Ice Machine Company as follows, to wit:

J. W. Skinkle	250 shares..	\$25,000.00
W. B. Bushnell	500 " ..	50,000.00
E. Jungensfeld.....	300 " ..	30,000.00
Jos. Koenigsberg, per E. Jungensfeld, as attorney-in-fact	250 " ..	25,000.00
Leo Rassieur.....	200 " ..	20,000.00
W. B. Bushnell, as treasury stock.....	500 " ..	50,000.00

Being in all 2,000 shares of the par value of.... \$200,000.00

And that afterwards, to wit, on the 27th day of September, 1884, said Henry D. Dement, secretary of state as aforesaid, issued a certificate that said The Consolidated Ice Machine Company was a legally organized corporation under the laws of the State of Illinois, as will more fully appear by reference to the record of said final certificate of incorporation, application for license and return of the commissioners, recorded in Book 34 of Corporation Records, page 229, to which reference is hereby made or to a certified copy of said record to be produced when and where this court may direct and hereto attached and marked Exhibit A.

137 Said State's attorney as aforesaid avers that the 500 shares of the capital stock of said The Consolidated Ice Machine Company subscribed by W. B. Bushnell, as and for treasury stock was not a subscription stock made in good faith; that neither said Bushnell nor the other subscribers to said capital stock expected or intended that they or said Bushnell should pay to said corporation the sum of \$50,000.00 or any other sum for or on account of said subscription and that no other or different subscription was made for the capital stock of said corporation respecting said 500 shares; that the same was never paid for nor was any amount whatever paid thereon or on account thereof by any person whatsoever, and that said 500 shares of the capital stock of said The Consolidated Ice Machine Company have never been issued.

Wherefore said State's attorney avers that the capital stock of said corporation was not originally and has not since been fully subscribed in good faith; that said The Consolidated Ice Machine Company for the space of the five years last past and more, in the county of Cook aforesaid, has used and still does use without any warrant, charter or grant the liberties, privileges and franchises set forth in the first count hereof; all of which liberties, privileges and franchises, the said The Consolidated Ice Machine Company during all the time aforesaid, has usurped and still does usurp to the damage and prejudice of said People and against the dignity of the same.

Whereupon the said State's attorney for the said People and in the name and by the authority thereof, prays the consideration of the court here in the premises and due process of law in this behalf to make the said The Consolidated Ice Machine Company answer to the said People of the State of Illinois by what warrant it claims to have used and enjoyed the liberties, privileges and franchises aforesaid.

JOEL M. LONGNECKER,
State's Att'y.

KNIGHT & BROWN AND
RUBENS & MOTT, *Of Counsel.*

Third Count.

And the said Joel M. Longnecker, State's attorney as aforesaid, gives the court here to understand and to be informed that Jacob W. Skinkle, Edward Mallinckrodt, Leo Rassieur, Annie Jungensfeld, Frederick Weidman, individually, and P. J. Lingenfeld and Leo Rassieur, executors of the estate of Edmund Jungensfeld, deceased, and as trustees of Carl Jungensfeld, a minor, and the German Savings Institution, a banking corporation of the State of Missouri, on and prior to the 16th day of April, A. D. 1891, claimed to be the holders and owners of the entire issued stock of the Consolidated Ice Machine Company, particularly mentioned and described
138 in the second count hereof and that on, to wit, the 16th day of April, 1891, as holders and owners of such issued stock of said corporation, jointly with the Consolidated Ice Machine Company, aforesaid, sold to the De La Vergne Refrigerating Machine

Company, a corporation of the city of New York and organized under and by virtue of the laws of the State of New York, all their right, title and interest, as a corporation and as stockholders aforesaid, in and to the assets of the said The Consolidated Ice Machine Company and the said stock, and have delivered said stock to said De La Vergne Refrigerating Machine Company, a corporation as aforesaid for like purposes as the above-named The Consolidated Ice Machine Company, and engaged in and carrying on a similar business as the said The Consolidated Ice Machine Company, as particularly set forth in the first count hereof.

Said State's attorney further avers that the entire issued stock of the said The Consolidated Ice Machine Company so owned and transferred by the stockholders as aforesaid, was of the par value of one hundred thousand dollars (\$100,000.00) fifty thousand dollars (\$50,000 00) of the capital stock of said The Consolidated Ice Machine Company never having been issued and fifty thousand dollars (\$50,000) of said capital stock, subscribed by W. B. Bushnell individually, having been forfeited by said corporation for non-payment of calls upon said subscription shortly after the organization of said corporation, as particularly detailed in the second count hereof, and having ever since said forfeiture been retained in the treasury of said corporation.

And said State's attorney further avers that such sale and assignment of stock is in law a sale and assignment of the capital stock and of the assets of said The Consolidated Ice Machine Company to said The De La Vergne Refrigerating Machine Company, a corporation, and that said latter corporation intends to enjoy the franchises granted to said The Consolidated Ice Machine Company and to carry on and conduct its business as a corporation under and by virtue of the said purchase as aforesaid, and claims by virtue of such purchase to have succeeded to the rights and franchises of the said The Consolidated Ice Machine Company.

And said State's attorney therefore avers that said, The Consolidated Ice Machine Company has forfeited all its rights, liberties, privileges and franchises to do business as a corporation, and that it is now engaged in exercising the liberties, privileges and franchises granted to it, as set forth in the first and second counts hereof, and in so doing upon the said People of the State of
139 Illinois has usurped and still does usurp to the damage and prejudice of the People and against the dignity of the same.

Whereupon the State's attorney for the said people and in the name and by the authority thereof prays the consideration of the court here in the premises and due process of law in this behalf, to make the said The Consolidated Ice Machine Company answer to the said The People of the State of Illinois by what warrant it claims to have used and enjoyed the liberties, privileges and franchises aforesaid.

JOEL M. LONGENECKER,

State's Att'y.

KNIGHT & BROWN AND
RUBENS & MOTT, *Of Counsel.*

EXHIBIT A.

STATE OF ILLINOIS, }
Department of State. }

Henry D. Dement, secretary of state, to all to whom these presents shall come, Greeting:

Whereas, a statement duly signed and acknowledged has been filed in the office of the secretary of state on the nineteenth day of July, A. D. 1884, for the organization of the Consolidated Ice Machine Company under and in accordance with the provisions of "An act concerning corporations," approved April 18, 1872, and in force July 1, 1872, and all acts amendatory thereof, a copy of which statement is hereto attached.

And whereas, a license has been issued to Edmund Jungenfeld, Joseph Koenigsberg and Leo Rassieur, as commissioners, to open books for subscription to the capital stock of the said company.

And, whereas, the said commissioners have on the twenty-seventh day of September, A. D. 1884, filed in the office of the secretary of state a report of their proceedings under said license, a copy of which report is hereto attached.

Now, therefore, I, Henry D. Dement, secretary of the State of Illinois, by virtue of the powers vested in me by law, do hereby certify that the said The Consolidated Ice Machine Company is a legally organized corporation under the laws of this State.

In testimony whereof I have hereunto set my hand and caused to be affixed the great seal of State done at the city of Springfield, this twenty-seventh day of September, in the year of our Lord one thousand eight hundred and eighty-four and of the Independence of the United States the one hundred and ninth.

HENRY D. DEMENT,
Secretary of State.

[Seal of the State of Illinois, Aug. 26th, 1818.]

140 STATE OF ILLINOIS, }
Cook County, } ss :

To Thomas D. Dement, secretary of state:

We, the undersigned, Edmund Jungenfeld, Joseph Koenigsberg and Leo Rassieur propose to form a corporation under an act of the General Assembly of the State of Illinois, entitled "An act concerning corporations," approved April 18, 1872, and all acts amendatory thereof, and for the purpose of such organization we hereby state as follows, to wit:

1. The name of such corporation is the Consolidated Ice Machine Company.

2. The object for which it is formed is to manufacture and sell ice-making and refrigerating machinery and all parts of such machinery, to acquire, sell and use patents for such machinery and licenses, to operate thereunder, to manufacture and sell ice and to establish and conduct cold-storage rooms and ice depots.

3. The capital stock shall be two hundred thousand dollars.
4. The amount of each share is one hundred dollars.
5. The number of shares shall be two thousand.
6. The location of the principal office is in Chicago, in the county of Cook, State of Illinois.
7. The duration of the corporation shall be twenty-five years.

EDMUND JÜNGENFELD.
JOSEPH KOENIGSBERG.
LEO RASSIEUR.

STATE OF MISSOURI, { ss :
City of St. Louis, }

I, Benjamin A. Suppan, a notary public in and for the city and State aforesaid, do hereby certify that on the 18th day of July, A. D. 1884, personally appeared before me Edmund Jungenfeld, Joseph Koenigsberg and Leo Rassieur, to me personally known to be the same persons who executed the foregoing statement and severally acknowledge that they executed the same for the purpose therein set forth.

In witness whereof I have hereunto set my hand and seal the day and year above written.

[SEAL.]

BENJAMIN A. SUPPAN,
Notary Public.

My term expires April 17, 1887.

To Henry D. Dement, secretary of the State of Illinois:

The commissioners duly authorized to open books of subscription to the capital stock of the Consolidated Ice Machine Company pursuant to license heretofore issued bearing date the 19th day of July,

A. D. 1884, do hereby report that they opened books of sub-
141 scription to the capital stock of said company and that the said stock was fully subscribed, that the following is a true copy of such subscription, viz :

We, the undersigned, do hereby severally subscribe for the number of shares set opposite our respective names to the capital stock of the Consolidated Ice Machine Company, of Chicago, Illinois, and we severally agree to pay the said company for each share, the sum of one hundred dollars, in such instalments as may be called for (—) the board of directors:

Names.	Shares.	Amount.
J. W. Skinkle.....	250	25,000
Wm. B. Bushnell.....	500	50,000
E. Jungenfeld.....	300	30,000
Jos. Koenigsberg, per E. Jungenfeld, his attorney-in-fact.....	250	25,000
Leo Rassieur.....	200	20,000
Wm. B. Bushnell, as treasury stock.....	500	50,000

That on the 22nd day of September, A. D. 1884, at the Grand Pacific hotel, northwest corner of Clark and Jackson streets Chicago, Ills., at the hour of two o'clock p. m., they convened a meeting of

the subscribers aforesaid pursuant to notice required by law, which said notice was deposited in the post-office, properly addressed to each subscriber, ten days before the time fixed therein, a copy of which said notice is as follows, to wit:

To — — —:

You are hereby notified that the capital stock of the Consolidated Ice Machine Company has been fully subscribed and that (at) a meeting of the subscribers of such stock will be held at the Grand Pacific hotel, northwest corner of Clark and Jackson streets, Chicago, Ills., on the 22nd day of September, A. D. 1884, at two o'clock p. m. for the purpose of electing a board of directors for said company and for the transaction of such other business as may be deemed necessary.

EDMUND JUNGENSELD,
JOS. KOEINGSBERG,
LEO RASSIEUR,
Commissioners.

That said subscribers met at the time and place in said notice specified and proceeded to elect directors and that the following persons were duly elected for the term of one year as follows: Jacob W. Skinkle, Edmund Jungenfeld, William B. Bushnell, Leo Rassieur.

(Signed)

J. KOEINGSBERG,
LEO RASSIEUR,
E. JUNGENSELD,
Commissioners.

142 STATE OF MISSOURI, } ss:
City of St. Louis, }

On this 25th day of September, A. D. 1884, personally appeared before me, a notary public in and for said city in said State, Edmund Jungenfeld, Joseph Koeingsberg and Leo Rassieur, and made oath that the foregoing report by them subscribed is true in substance and in fact.

[SEAL.]

BENJ. A. SUPPAN,
Notary Public.

My term expires April 17th, 1887.

No. 1,244,240.

Recorded April 3, 1890, at 12 m.

JOHN STEPHENS, *Recorder.*

STATE OF ILLINOIS, } ss:
County of Cook, }

I, John Stephens, recorder of deeds in and for said county, in the State aforesaid, do hereby certify that the annexed is a true and correct copy of the record of a certain instrument filed in my office the third day of April, A. D. 1890 as document No. 1,244,240 and recorded in Book 34 of Corporations, page 229.

In testimony whereof I have hereunto set my hand and affixed my official seal at Chicago this thirtieth day of June, A. D. 1891.

[SEAL.]

JOHN STEPHENS, *Recorder.*

And afterwards, to wit: on the 21st day of July, A. D. 1891, certain pleas were filed in the office of the clerk of said court in the words and figures following, to wit:

Pleas.

STATE OF ILLINOIS, }
County of Cook, } ss:

In the Circuit Court of said Cook County.

THE CONSOLIDATED ICE MACHINE COMPANY }
ats.

THE PEOPLE, ETC.

} Quo Warranto.

And now comes The Consolidated Ice Machine Company, by Tatham & Webster, its attorneys, and having heard the said amended information read, for plea in its behalf, as to the first count of said amended information, says that heretofore, to wit: on the 19th day of July, 1884, a statement, duly signed and acknowledged, was filed in the office of the secretary of state of said State of Illinois, for the organization of said respondent, The Consolidated Ice Machine Company, under and in accordance with the provisions of an act concerning corporations, approved April 18th, 1872, and in force 143 July 1, 1872, and all acts amendatory thereof; that for the purpose of such organization it was in the said statement, among other things, stated that the name of said corporation so to be organized was the Consolidated Ice Machine Company, and that the object for which it was formed was "to manufacture and sell ice-making and refrigerating machinery and all parts of such machinery, to acquire, sell and use patents for such machinery and licenses to operate thereunder, to manufacture and sell ice and to establish and conduct cold-storage rooms and ice depots;" that thereupon and on to wit: said 19th day of July, 1884, a license was issued to Edmund Jungenfeld, Joseph Koenigsberg, and Leo Rasseur, as commissioners, to open books of subscription to the capital stock of said corporation; that thereafter on to wit: the 27th day of September, 1884, said commissioners filed in the office of said secretary of state a report of their proceedings in said license and thereupon, on to wit: said 27th day of September, 1884, said secretary of state issued and delivered to said The Consolidated Ice Machine Company, respondent above named, under his hand and the great seal of State of the State of Illinois, a certificate of the complete organization of said corporation, respondent herein, in accordance with the provisions of the statute in such case made and provided, which said certificate was afterwards duly recorded in the office of the recorder of deeds of said Cook county, Illinois, where the principal office of said corporation is located, in Book 34 of Corporation Records, on page 229; which said certificate is in words and figures following, to wit:

STATE OF ILLINOIS, }
 Department of State. }

Henry D. Dement, secretary of state, to all to whom these presents shall come, Greeting :

Whereas, a statement, duly signed and acknowledged, has been filed in the office of the secretary of state, on the nineteenth day of July, A. D. 1884, for the organization of the *the Consolidated Ice Machine Company* under and in accordance with the provisions of "an act concerning corporations," approved April 18, 1872, and in force July 1, 1872, and all acts amendatory thereof, a copy of which statement is hereto attached ;

And whereas, a license has been issued to Edmund Jungensfeld, Joseph Koenigsberg and Leo Rassieur as commissioners to open books for subscription to the capital stock of the said company ;

And whereas, the said commissioners have, on the twenty-seventh day of September, A. D. 1884, filed in the office of the secretary of state a report of their proceedings under said license,
 144 a copy of which report is hereto attached :

Now, therefore, I, Henry D. Dement, secretary of state of the State of Illinois, by virtue of the powers vested in me by law, do hereby certify that the said *The Consolidated Ice Machine Company* is a legally organized corporation under the laws of this State.

In testimony whereof, I hereto set my hand and cause to be affixed the great seal of State. Done at the city of Springfield, this twenty-seventh day of September, in the year of our Lord one thousand eight hundred and eighty-four and of the Independence of the United States (—) one hundred and ninth.

[SEAL.]

HENRY D. DEMENT,
Secretary of State.

And respondent avers that by virtue of the premises said respondent was constituted and became a body corporate and politic in fact and in name, by the name of the *Consolidated Ice Machine Company* ; that immediately after the issuing of said certificate of the complete organization, respondent commenced business as a corporation under and in pursuance of the warrant, charter or grant duly vested in it, said respondent, by virtue of said certificate and under and by virtue of the laws of the said State of Illinois, and has ever since been and still is engaged in business as such corporation as aforesaid ; and by this warrant the said *The Consolidated Ice Machine Company* has used during all the time in said information mentioned and still uses the said liberties, privileges and franchises of manufacturing and selling ice-making and refrigerating machinery and all parts of such machinery, and acquiring, selling and using patents for such machinery and licenses to operate thereunder, and to manufacture and sell ice and to establish and conduct cold-storage rooms and ice depots, as the said *The Consolidated Ice Machine Company* well might and still may ; without this, that the said *The Consolidated Ice Machine Company* has usurped and now does usurp the liberties, privileges and franchises aforesaid, or any

or either of them, upon the said people, as by the said first count of said amended information is above alleged. All of which matters the said The Consolidated Ice Machine Company is ready to verify, etc. Wherefore it prays judgment, etc.

TATHAM & WEBSTER,
Attorney for Respondent.

And respondent as to the second count of said amended information comes and defends, etc., when, etc., and says that the said
145 count of said amended information, and the matters therein contained, in manner and form as the same are above set forth, are not sufficient in law for the people of the State of Illinois to maintain their aforesaid action, and that this respondent is not bound by law to answer the same. And this it is ready to verify, etc. Wherefore it prays judgment, etc.

TATHAM & WEBSTER,
Attorneys for Respondent.

And the said respondent as to the said third count of said amended information above pleaded, etc., protested that the same and the matters therein contained are not sufficient in law to convict it, said respondent, of the premises in the said amended information above charged upon it, nor to remove it from the liberties, privileges and franchises aforesaid, and that it need not nor is it bound by the law of the land to answer thereto, yet for a plea in this behalf, the said respondent says that it, the said The Consolidated Ice Machine Company did not, on to wit: the 16th day of April, 1891, jointly with said Jacob W. Skinkle, Edward Mallinckrodt, Leo Rassieur, Annie Jungenfeld, Frederick Widmann, individually, and P. J. Lingenfelder and Leo Rassieur as executors of the estate of Edmund Jungenfeld, deceased, and trustees of Carl Jungenfeld, a minor, and the German Savings Institution, a banking corporation, etc., sell to said The De La Vergne Refrigerating Machine Company, a corporation, etc., all its right, title and interest as a corporation in and to the assets of stock of said The Consolidated Ice Machine Company, in manner and form as said State's attorney hath for the people, etc., above in said third count of said amended information in that behalf alleged. And of this it, said respondent, puts itself upon the country, etc.

TATHAM & WEBSTER,
Attorneys for Respondent.

Be it remembered that on, to wit: the 4th day of April, A. D. 1894, the (the) following among other proceedings were had and entered of record in said court, to wit:

(Order, Ap'l 4, '94.)

Petition.

PEOPLE OF THE STATE OF ILLINOIS <i>ex Rel.</i> JOEL M. LONGE- necker <i>vs.</i> CONSOLIDATED ICE MACHINE COMPANY.	}	92682.
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This cause being this day called for trial, and the plaintiffs failing to prosecute their suit in this behalf, on motion of defendant's attorney it is ordered that said cause be, and the same is hereby dismissed for want of prosecution.

146 And afterwards, to wit: on the 10th day of April, A. D. 1894, a certain motion and a certain affidavit were filed in the office of the clerk of said court, in the words and figures following, to wit:

(Notice.)

STATE OF ILLINOIS, }
County of Cook, } ss:

In the Circuit Court of Cook County.

THE PEOPLE <i>vs.</i> THE CONSOLIDATED ICE MACH. CO.	}
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Tatham & Webster, attorneys for said defendant:

You are hereby notified that on Tuesday, the 10th day of April, A. D. 1894, at 10 a. m. or as soon thereafter as counsel can be heard I shall before his honor, Judge Windes in the room usually occupied by him as a court-room, in said county, ask the court to reinstate the above-entitled cause on his docket at which time and place you may appear if you see fit.

M. T. MOLONEY,
For the People.

Indorsed: "Service of a copy of the within notice accepted this 9th day of April, 1894. Tatham & Webster, att'ys for def't."

(Motion.)

STATE OF ILLINOIS, }
County of Cook, } ss:

In the Circuit Court Thereof.

And now comes M. T. Molony, attorney general of the State of Illinois, and moves the court to direct and order the above-entitled cause to be redocketed and replaced upon the people's calendar and in support of this motion he files herewith and makes part hereof the affidavit of the assistant attorney general.

M. T. MOLONY.

(Affidavit.)

STATE OF ILLINOIS, }
County of Cook, } ss :

T. J. Scofield, having been first duly sworn, on oath says that he is the first assistant attorney general of the State of Illinois, and as such has charge of and represents the State in the people's calendar pending for trial before Judge Windes; that by agreement between

147 Judge Windes and this affiant, the people's calendar was set for call on Tuesday the 3rd day of April, A. D. 1894; that some time subsequent to the setting of said call the Hon.

Jos. P. Mahoney called on this affiant and requested that the call of the people's docket be postponed until Friday the 6th day of April, A. D. 1894, in order that the said Mahoney might dispose of a case on the calendar of the said Judge Windes. This affiant further states that in company with the said Mahoney he called upon Judge Windes and stated to his honor that Senator Mahoney desired to try a case in advance of the trial of the people's docket, and that the people were willing to accommodate Senator Mahoney if such postponement would in no way inconvenience Judge Windes or the business of his court; that the matter was discussed and a conclusion was reached; and this affiant states that it was his understanding that it was agreed between Judge Windes, Senator Mahoney and himself that the call of the people's calendar was postponed as a result of said conference until Friday, April 6, 1894. With this understanding the affiant left the city of Chicago, and went to the city of Springfield to attend to other work in the attorney general's office, and that during his absence at said city of Springfield said calendar was called on Wednesday, April 4th, 1894, and on said calling the above-entitled cause was dismissed on motion of the defendant or attorneys.

T. J. SCOFIELD.

Subscribed and sworn to before me this 10th day of April, 1894.

[L. S.]

P. J. O'SHEA, *Notary Public.*

UNITED STATES OF AMERICA.

STATE OF ILLINOIS, }
Cook County, } ss :

I, Frank J. Gaulter, clerk of the circuit court of Cook county, in the State aforesaid, do hereby certify that I am the keeper of the record and files of said court, and that the above and foregoing is a true, perfect and complete transcript of the record in a certain cause lately pending in said court, on the common-law side thereof, between People of the State of Illinois *ex rel.* Joel M. Longenecker, plaintiff, and Consolidated Ice Machine Company, defendant,

In witness whereof, I have hereunto set my hand and affixed the seal of said court at Chicago, in said county, this twenty-first day of February, A. D. 1896.

[SEAL.]

FRANK J. GAULTER, *Clerk.*STATE OF ILLINOIS, }
County of Cook, } ss :

I, M. F. Tuley, chief justice of the circuit court of Cook county,

148 in the State of Illinois, hereby certify that Frank J. Gaulter, who signed the above certificate, was at the time of signing the same, and is now, clerk of the said circuit court of Cook county, duly commissioned and qualified; that said court is a court of record, having a clerk and seal; that said attestation is in due form and by the proper officer, according to the laws of the State of Illinois, and that the above signature of said clerk is genuine.

Witness my hand and seal at Chicago, in said county of Cook, this 21st day of February, A. D. 1896.

M. F. TULEY, [SEAL.]

Chief Justice of the Circuit Court of Cook County.

STATE OF ILLINOIS, }
County of Cook, } ss :

I, Frank J. Gaulter, clerk of the circuit court of Cook county, in the State of Illinois (said court being a court of record), do hereby certify that the Honorable M. F. Tuley whose name is subscribed to the annexed and foregoing certificate was, at the time of the signing thereof, and now is, chief justice of said circuit court, duly elected, commissioned and qualified, and that his said signature is genuine.

In witness whereof I have signed my name and affixed the seal of said circuit court, at my office, in the city of Chicago, in said Cook county, this 21st day of February, 1896.

[SEAL.]

FRANK J. GAULTER, *Clerk.*

UNITED STATES OF AMERICA.

STATE OF ILLINOIS, }
County of Cook, } ss :

Pleas before the Honorable Orrin N. Carter, sole presiding judge of the county court of Cook county, in the State of Illinois, at a regular term of said county court of Cook county, begun and holden at the court-house, in the city of Chicago, in said county and State, on the second Monday, being the 13th day, of July, in the year of our Lord one thousand eight hundred and ninety-one, and of the Independence of the United States of America the one hundred and sixteenth.

Present: The Honorable Orrin N. Carter, judge of the county court of Cook county.

James Pease, sheriff of Cook county.

Attest: PHILIP KNOPF, *Clerk.*

Be it remembered that heretofore, to wit: on the 3rd day of August in the year of our Lord one thousand eight hundred and ninety-one, the same being one of the days of the July term of the county court of Cook county, the following report of bids received by assignee was filed with the clerk of said court, in words and figures, to wit:

U. S. Circuit Ct., }
E. Dist. of Mo. }
German Savings Institution }
vs. }
De La Vergne Refrigerating Mch. Co. et al. }
Defendants' Ex. 2.
E. B. Sherman,
Master.

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(Bid No. 1.)

CHICAGO, August 1st, 1891.

Mr. Robert E. Jenkins, assignee.

DEAR SIR: I bid for items one and two of your circular of June 30th, 1891, in the matter of the Consolidated Ice Machine Co. insolvent, sixty-six thousand dollars (\$66,000.00), payable one-third ($\frac{1}{3}$) cash in ten (10) days, one third ($\frac{1}{3}$) on or before three (3) months or as soon as money can be borrowed on real estate, one-third ($\frac{1}{3}$) on or before eight (8) months, interest at six per cent. per annum on deferred payments.

Bill of sale to be given on second payment, third payment to be secured by mortgage on property stated in item one, or otherwise satisfactorily secured.

Option of assuming lease or not.

All tools and unused stock belonging to the insolvents used in finishing work outside of city, and which may or may not be included in inventory, to be included. Allowance to be made for what has been sold out of stock, since taking inventory, and at prices realized.

Respectfully,

WM. H. WARRINGTON.

(Bid No. 2.)

In the County Court of Cook County.

In the Matter of THE CONSOLIDATED ICE MACHINE COMPANY, Insolvent.

Robert E. Jenkins, Esq., assignee.

DEAR SIR: I am instructed by the De La Vergne Refrigerating Machine Company of New York to submit to you the following bid in response to your printed notice dated Chicago, June 30, 1891.

The De La Vergne Refrigerating Machine Company of New York offers the sum of twenty-five thousand dollars (\$25,000) in cash for the items enumerated in the paragraphs numbered respectively one, two, three and four of your said printed notice, payable upon the transfer to the De La Vergne Refrigerating Machine Company of the property covered by said items.

Very respectfully,

JOHN R. WATERS.

The Wellington, Chicago, July 31, 1891.

(Bid No. 3.)

In the County Court of Cook County.

In the Matter of THE CONSOLIDATED ICE MACHINE COMPANY, Insolvent.

Robert E. Jenkins, Esq., assignee.

DEAR SIR: I am instructed by the De La Vergne Refrigerating Machine Company of New York to submit to you the following bid in response to your printed notice dated Chicago, June 30th, 1891.

The De La Vergne Refrigerating Machine Company of New York offers for the items enumerated in the paragraphs numbered respectively four and six of your said printed notice a rental at the rate of seventy-five hundred dollars per annum (\$7,500), payable half yearly in advance. Said rental to begin from the time the De La Vergne Refrigerating Machine Company is put in possession of the property and to continue until the 1st May, 1893 (the date suggested in your notice) at which date the arrangement hereby proposed is to cease and determine. The De La Vergne Refrigerating Machine Company to assume the rent of the premises referred to in paragraph four during the same period, to give an approved bond in the sum of twenty thousand dollars (\$20,000) for the payment of rents and the preservation and return of the property (due allowance being made for ordinary wear and tear) loss by fire excepted and at its own proper cost and expense to keep the property fully insured against loss or damage by fire.

Very respectfully,

JOHN R. WATERS.

The Wellington, Chicago, July 31st, 1891.

(EXHIBIT A.)

In the County Court of Cook County.

In the Matter of THE CONSOLIDATED ICE MACHINE COMPANY, Insolvent.

Pursuant to the direction of said court, the undersigned, assignee of the estate of said insolvent, offers for sale the following-described assets of said insolvent, viz:

1. Its manufacturing plant in Chicago, including machinery, tools, patterns and drawings, the total cost of which was about \$100,000. This includes all patterns, drawings, tools, and machinery belonging to said company, whether at the factory, in the hands of John Featherstone's Sons, or of the Pittsburg Steel Casting Company, or elsewhere, including also good will of business.

2. Also stock of merchandise remaining on hand and in the factory at Chicago, the total cost of same being as per inventory \$29,955.66.

3. Also interest of the undersigned, whatever it may be, in \$50,000, par value of the capital stock of said company, which was subscribed for as "treasury stock," but which has never been issued, and in \$50,000 par value of capital stock subscribed for by
 151 W. B. Bushnell, but upon which subscription only partial payment was made, and said stock was forfeited for non-payment of balance and was never issued.

4. Also the lease of the premises now occupied by said insolvent, and expiring May 1, 1893.

Bids will be received for the whole of the above, or any part thereof, at the office of the undersigned, No. 89 East Madison street, Chicago, until 9 o'clock in the forenoon of Saturday, August first (1st) next. Such bids may be made for the purchase of said property as aforesaid, either for cash, or partly for cash and partly upon credit.

5. Bids will also be received as above for the purchase of the said property, together with all other assets of the said insolvent in bulk, including all claims for moneys due and owing upon promissory notes, contracts, book accounts, and all property of every name and nature belonging to said insolvent.

Inventories may be examined, and information obtained upon application to the undersigned.

6. Bids will also be received for leasing the property described in paragraph 1. The bidders will state the rent offered, and the guarantees proposed for preservation and return of property. It is suggested that the time do not extend beyond May 1, 1893, when lease of the building expires.

The right to reject all bids is reserved, and all bids received will be reported to said court for its action thereon.

ROBERT E. JENKINS, *

Assignee as Aforesaid.

Chicago, June 30, 1891.

In the County Court of Cook County, June Term, A. D. 1891.

In the Matter of THE CONSOLIDATED ICE MACHINE COMPANY, Insolvent.

STATE OF ILLINOIS, }
 County of Cook, } ss.:

Martin Dwyer, being duly sworn, on oath states that as agent for and by direction of Robert E. Jenkins, assignee of the estate of said insolvent, this deponent mailed notices of sale, a copy of which is attached hereto, and marked Exhibit A, to all creditors of said estate, whose names are contained in the report of said assignee of claims filed against said estate. That such notices were prop-
 152 erly addressed to such creditors, and were mailed by deponent in post-office in Chicago, July 3rd, 1891, during the afternoon of said date.

MARTIN DWYER.

Subscribed and sworn to before me this seventh day of July,
A. D. 1891.

[SEAL.]

HARRY SKINKLE,
Notary Public.

In the County Court of Cook County.

In the Matter of THE CONSOLIDATED ICE MACHINE COMPANY, Insolvent.

Pursuant to the order of said court, the undersigned, assignee of the estate of said insolvent, offers for sale the following-described assets of said insolvent, viz :

1. Its manufacturing plant in Chicago, including machinery, tools, patterns and drawings, the total cost of which was about \$100,000.00; also good will of business.

2. Also stock of merchandise, remaining on hand and in the factory at Chicago, the total cost of same being as per inventory, \$29,955.66.

3. Also interest of the undersigned, whatever it may be, in \$50,000.00 par value of the capital stock of said company, which was subscribed for as "treasury stock," but which has never been issued, and in \$50,000.00 par value of capital stock subscribed for by W. B. Bushnell, but forfeited for non-payment and never issued.

4. Also the lease of the premises now occupied by said insolvent, expiring May 1st, 1893.

Bids will be received for the whole of the above or any part thereof at the office of the undersigned, No. 89 East Madison St., Chicago, until 9 o'clock in the forenoon of Saturday, August 1st, next. Such bids may be made for the purchase of said property as aforesaid, either for cash or partly for cash and partly upon credit.

5. Bids will also be received as above for the purchase of said property together with all other assets of the said insolvent in bulk, including all claims for money due and owing upon promissory notes, contracts, book accounts and all property of every name and nature belonging to said insolvent.

6. Bids will also be received for leasing the property described in paragraph 1. The bidders will state the rent offered and the

153 guarantees proposed for preservation and return of property. It is suggested that the time do not extend beyond May 1, 1893, when the lease of the building expires.

The right to reject all bids is reserved and all bids received will be reported to said court for its action thereon.

ROBERT E. JENKINS,
Assignee as Aforesaid.

Chicago, June 30, 1891.

R. W. Patterson, Jr., of the city of Chicago in the county of Cook, State of Illinois, doth hereby certify that he is sec'y and treas. of the

Tribune Company, and duly authorized to sign for said company, publishers of the Chicago Tribune, a daily newspaper of general circulation published in said county, and that the notice of R. E. Jenkins, of which the annexed is a true copy, was printed and published in the regular edition and issue of said Chicago Tribune for (17) seventeen times, to wit:

The first publication being on the 13th day of July, 1891, and last on the 31st day of July, 1891.

Dated at Chicago, Ill., this thirty-first day of July, 1891.

R. W. PATTERSON, JR.,
Secretary and Treasurer.

Sworn and subscribed to before me this — day of —, 188—.

Notary Public.

In the County Court of Cook County, July Term, A. D. 1881.

In the Matter of THE CONSOLIDATED ICE MACHINE COMPANY, Insolvent.

To the Honorable Frank Scales, judge of said court:

The undersigned assignee of the estate of the said insolvent, respectfully reports:

That pursuant to the direction of the court, he offered for sale the entire assets and property of the said insolvent, giving the parties desiring to purchase the same privilege of bidding upon the whole or upon any part or portion thereof, to be paid for either in cash, or partly in cash and partly upon credit.

That the undersigned advertised the said sale by a printed circular, which was mailed to all the creditors, whose names are contained in the report of claims filed herein by the undersigned.

That such notices were mailed in the post-offices in Chicago on the third (3) day of July, 1891, and a copy of such notice with
154 the affidavit of mailing are attached hereto, and made part of this report. That notice of such sale was also given by publication in the Chicago Tribune daily, except Sunday, from the 13th to the 31st days of July inclusive, and a copy of such notice with the publisher's certificate is attached hereto and made part hereof.

That in response to the said advertisements, the undersigned has received three bids, which are attached hereto, and marked numbers 1, 2 and 3 respectively, and reference is here made to the same for details as to the terms thereof.

That bid No. 1, by William H. Warrington, is for items Nos. 1 and 2, as shown in said notice of sale, being for the manufacturing plant, including all tools, machinery, patterns, good will and drawings, and the stock of merchandise on hand, including also any stock or tools not inventoried.

That said Warrington bids for said property the sum of sixty-six

thousand dollars (\$66,000.00), payable one-third ($\frac{1}{3}$) in cash, one-third ($\frac{1}{3}$) on or before three months (3), and one-third ($\frac{1}{3}$) on or before eight (8) months, with interest at six (6) per cent. on deferred payments, and security to be given for same as stated in said bid.

That bid No. 2 is made by the De La Vergne Refrigerating Company, and covers the property included in bid No. 1, and also the property included in items No. 3, 4, of notice, and is for the sum of twenty-five thousand (25,000) dollars cash.

That bid No. 3 is a bid for the leasing of the property in accordance with paragraph 6 of the advertisement.

That these are all the bids which have been received.

And the undersigned submits the said bids to the court and prays the direction of the court in the premises.

ROBERT E. JENKINS,

Assignee of the Consolidated Ice Machine Company.

STATE OF ILLINOIS, }
County of Cook, } ss:

Robert E. Jenkins, being duly sworn, on oath states that he has read the foregoing report, and knows the contents thereof, and that the statements therein contained are true.

ROBERT E. JENKINS.

Subscribed and sworn to before me this third day of August, 1891.

[SEAL.]

GEORGE N. STONE,

Notary Public.

STATE OF ILLINOIS, }
Cook County, } ss:

I, Philip Knopf, clerk of the county court of Cook county, 155 and the keeper of the records and files thereof, in the State aforesaid, do hereby certify the above and foregoing to be a true, perfect and complete copy of a certain report of bids received by assignee in a certain cause docket No. 8970 in said court in the matter of the voluntary assignment of the Consolidated Ice Machine Company, debtor, Robert E. Jenkins, assignee.

In witness whereof, I have hereunto set my hand and affixed the seal of said court, at Chicago, in said county, this 21st day of February, 1896.

[SEAL.]

PHILIP KNOPF, *Clerk.*

STATE OF ILLINOIS, } ss :
County of Cook, }

Defendants' Ex. 3.
E. B. Sherman,
Master.

German Savings Institution
vs.

The De La Vergne Refrigerating Machine Co. et al.

I, Orrin N. Carter, county judge of Cook county, and sole presiding judge of the county court of Cook county, in the State of Illinois, do hereby certify that Philip Knopf, Esq., whose name is subscribed to the foregoing certificate of attestation now is and was at the time of signing and sealing the same, the clerk of the county court of Cook county aforesaid, and keeper of the records and seal thereof, duly elected and qualified to office, and that full faith and credit are, and of right ought to be given to all his official acts as such, in all courts of record and elsewhere, and that his said attestation is in due form of law, and by the proper officer.

Given under my hand and seal, at my chambers, in Chicago, this — day of —, A. D. 189—.

— —, [SEAL.]
County Judge.

UNITED STATES OF AMERICA.

STATE OF ILLINOIS, } ss :
County of Cook, }

Pleas before the Honorable — N. Carter, sole presiding judge of the county court of Cook county, in the State of Illinois, at a regular term of said county court of Cook county, begun and holden at the court-house, in the city of Chicago, in said county and State, on the second Monday, being the 14th day of September, in the year of our Lord one thousand eight hundred and ninety-one, and of the Independence of the United States of America the one hundred and sixteenth.

Present: The Honorable Orrin N. Carter, judge of the county court of Cook county.

James Pease, sheriff of Cook county.

Attest: PHILIP KNOPF, *Clerk*.

Be it remembered that heretofore, to wit: on the 3rd day of October, in the year of our Lord one thousand eight hundred and ninety-one, the same being one of the days of the September term of the county court of Cook county, the following among other proceedings were had and entered of record in said court, to wit:

U. S. Circuit Court,
Eastern Dist. of Missouri.

156 In the County Court of Cook County.

In the Matter of THE CONSOLIDATED ICE MACHINE COMPANY,
Insolvent.*Order.*

The matter of the bid received by the assignee from William H. Warrington for the plant and stock belonging to the Consolidated Ice Machine Company, insolvent, coming on for hearing upon the objections heretofore filed thereto, the court being fully advised in the premises overrules said objections so filed to the acceptance of said proposition so submitted to the assignee by William H. Warrington; and thereupon Clarence A. Knight and Otto C. Butz, trustees, submitted a bid to the court for the sum of sixty-six thousand dollars (\$66,000.00), without qualification, which bid was considered by the court as better than the said bid heretofore submitted by said Warrington; and thereupon the said bidders respectfully increased their said bids, one after the other, until a bid was submitted in words and figures as follows:

"CHICAGO, October 30th, 1891.

" Robert E. Jenkins, assignee :

" We bid for items 1 and 2 of your circular of June 30th, 1891, in the matter of the Consolidated Ice Machine Company, insolvent, seventy thousand five hundred dollars, payable one-third cash in ten (10) days, one-third on or before three (3) months, and one-third on or before eight (8) months; interest at six per cent. per annum on deferred payments. Option of assuming lease or not. All tools and unused stock belonging to the insolvent, used in finishing work outside of the city, and which may or may not be included in the inventory, to be included. Deferred payments to be secured to satisfaction of assignee.

" Respectfully yours, CLARENCE A. KNIGHT,
OTTO C. BUTZ,

" Trustees for \$309,000 of Claims against said Estate."

And said last-named bid so submitted by said Clarence A. Knight and Otto C. Butz, as trustees as aforesaid, being the highest and best bid for said property therein described and referred to—

It is therefore ordered, adjudged and decreed by the court that the said bid of said Clarence A. Knight and Otto C. Butz, as trustees for the sum of seventy thousand five hundred dollars (70,500(0) 00) be and the same is hereby received and confirmed, and that said Robert E.

Jenkins, as such assignee, is authorized, empowered and
157 directed by the court to accept said bid last named and to take such action and perform such duties as are necessary and proper to consummate and carry into effect the said sale and purchase of the said plant and property included in said bid, and, upon payment as provided in said bid, to execute all necessary and proper bills of sale and other instruments to transfer to and vest in said trustees the right, title, and interest of said insolvent in and to

said property and merchandise, and to arrange for satisfactory security as to the deferred payments due for said property and merchandise, in pursuance of the terms of said bid, and report such proposed security to the court, before any delivery of said property to said purchasers, for its ratification and approval.

Indorsed: 8970. County court, Cook county. *In re Consolidated Ice Machine Co. Order.* Enter Oct. 30, 1891. Henry Wulff, clerk. O. K. Otis. O. K. Butz.

STATE OF ILLINOIS, } ss:
Cook County,

I, Philip Knopf, clerk of the county court of Cook county, and the keeper of the records and files thereof, in the State aforesaid, do hereby certify the above and foregoing to be a true, perfect and complete copy of a certain order entered of record Oct. 3rd, 1891, in a certain cause docket No. 8970 in said court in the matter of the voluntary assignment of the Consolidated Ice Machine Company, debtor, Robert E. Jenkins, assignee.

In witness whereof, I have hereunto set my hand and affixed the seal of said court, at Chicago, in said county, this 21st day of February, 1896.

[SEAL.]

PHILIP KNOPF, *Clerk.*

STATE OF ILLINOIS, } ss:
County of Cook,

I, Orrin N. Carter, county judge of Cook county, and sole presiding judge of the county court of Cook county, in the State of Illinois, do hereby certify that Philip Knopf, Esq., whose name is subscribed to the foregoing certificate of attestation now is and was at the time of signing and sealing the same, the clerk of the county court of Cook county, aforesaid, and keeper of the records and seal thereof, duly elected and qualified to office, and that full faith and credit are, and of right ought to be given to all his official acts as such, in all courts of record and elsewhere, and that his said attestation is in due form of law, and by the proper officer.

Given under my hand and seal, at my chambers in Chicago, this — day of —, A. D. 189—.

—, [SEAL.]
County Judge.

Defendants' Ex. 4.
E. B. Sherman,
Master.

German Savings Institution
vs.
De La Vergne Refrigerating Machine Co. et al.

U. S. Circuit Ct.,
E. Dist. of Mo.

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UNITED STATES OF AMERICA.

STATE OF ILLINOIS, } ss:
County of Cook, }

Pleas before the Honorable Orrin N. Carter, sole presiding judge of the county court of Cook county, in the State of Illinois, at a regular term of said county court of Cook county, begun and holden at the court-house, in the city of Chicago, in said county and State, on the second Monday, being the 13th day, of April, in the year of our Lord one thousand eight hundred and ninety-one, and of the Independence of the United States of America the one hundred and fifteenth.

Present: The Honorable Orrin N. Carter, judge of the county court of Cook county.

James Pease, sheriff of Cook county.

Attest: PHILIP KNOPF, Clerk.

Be it remembered that heretofore, to wit: on the 4th day of May in the year of our Lord one thousand eight hundred and ninety-one, the same being one of the days of the May term of the county court of Cook county, the following among other proceedings were had and entered of record in said court, to wit:

In the County Court of Cook County.

In the Matter of THE CONSOLIDATED ICE MACHINE Company, Insolvent.

It appearing to the court from the petition of Robert E. Jenkins, assignee of the Consolidated Ice Machine Company, an insolvent debtor, that the said petitioner as such assignee has carried on and prosecuted the business of said company in pursuance to the order heretofore entered by this court, and has completed certain unfinished contracts and expects to be able to finish and complete all such unfinished contracts within the succeeding thirty days from the date of the entry hereof; and that upon the completion of said contracts it will, in the opinion of said assignee, be unnecessary to longer continue said business or occupy the premises heretofore occupied by said insolvent; and that it will be for the interests of said insolvent and its creditors and stockholders and all parties in interest upon the completion of said unfinished contracts, to sell and dispose of the manufacturing plant of said insolvent, including machinery, tools, patterns, drawings and good will, and also all stock on hand at the time of such sale;

It is therefore ordered and decreed by the court that the said Robert E. Jenkins, as such assignee, be and is hereby authorized

159 and empowered to advertise and offer for sale for cash the entire manufacturing plant of the said The Consolidated Ice Machine Company, including all machinery, tools, patterns, drawings, and the good will of said company, and also all stock remaining on hand at the time of such sale, to be inventoried and sold with said other property and assets of said insolvent; that said assignee is hereby authorized and empowered to advertise and offer for sale the said property as an entirety, including the present leasehold interest of said premises occupied by said insolvent, which will expire on May 1st, 1893, together with the entire manufacturing plant, machinery, tools, patterns, drawings, and good will, as aforesaid, and to cause an inventory of the stock on hand belonging to said insolvent to be made, and to advertise and receive bids for the said stock on hand so inventoried, and said plant, property and assets, up to twelve o'clock, noon, on Saturday, May 30th, 1891.

It is further ordered that said assignee reserve the right to reject any and all bids that may be so received by him, and that upon the receipt of any bid or bids up to the date aforesaid, the said assignee submit the same to this court with such recommendations with reference to the same as to him shall seem meet and proper and for the interest of said insolvent and its creditors, (—) for such other, further or final order thereon as to this court shall seem meet and proper.

And it is further ordered that said assignee have leave from time to time, to apply to this court for such further or other order in connection with the advertisement and sale of said property as shall be deemed necessary and proper.

STATE OF ILLINOIS, }
Cook County, } ss:

I, Philip Knopf, clerk of the county court of Cook county, and the keeper of the records and files thereof, in the State aforesaid, do hereby certify the above and foregoing to be a true, perfect and complete copy of a certain order entered May 4th, 1891, in a certain cause in said court in the matter of the vol. assignment of Consolidated Ice Machine Company, debtor, Robert E. Jenkins, assignee, docket No. 8970.

In witness whereof, I have hereunto set my hand and affixed the seal of said court, at Chicago, in said county, this 21st day of February, 1896.

[SEAL.]

PHILIP KNOPF, *Clerk.*

STATE OF ILLINOIS, }
County of Cook, } ss:

I, Orrin N. Carter, county judge of Cook county, and sole presiding judge of the county court of Cook county, in the State of Illinois, do hereby certify that Philip Knopf, Esq., whose
160 name is subscribed to the foregoing certificate of attestation now is and was at the time of signing and sealing the same, the clerk of the county court of Cook county, aforesaid, and keeper of the records and seal thereof duly elected and qualified to office,

and that full faith and credit are and of right ought to be given to all his official acts as such, in all courts of record and elsewhere, and that his said attestation is in due form of law, and by the proper officer.

Given under my hand and seal, at my chambers, in Chicago, this — day of —, A. D. 189—.

—, [SEAL.]
County Judge.

Circuit court U. S., N. dist. Ill., N. div. German Savings Institution vs. De La Vergne Refrigerating Co. Record of the proceedings of the stockholders and board of directors of the "The Consolidated Ice Machine Company." Defendants' Exhibit 10. E. B. Sherman, master.

Certificate of Incorporation.

STATE OF ILLINOIS.

DEPARTMENT OF STATE.

Henry D. Dement, secretary of state.

To all to whom these presents shall come, Greeting :

Whereas, a statement, duly signed and acknowledged, has been filed in the office of the secretary of the state, on the nineteenth day of July, A. D. 1884, for the organization of the The Consolidated Ice Machine Company, under and in accordance with the provisions of "An act concerning corporations," approved April 18, 1872, and in force July 1, 1872, and all acts amendatory thereof, a copy of which statement is hereto attached ;

And whereas, a license has been issued to Edmund Jungenfeld, Joseph Koenigsberg and Leo Rassieur as commissioners to open books for subscription to the capital stock of the company ;

And whereas, the said commissioners have, on the twenty-seventh day of September, A. D. 1884, filed in the office of the secretary of state a report of their proceedings under said license, a copy of which report is hereto attached :

Now, therefore, I, Henry D. Dement, secretary of state of the State of Illinois, by virtue of the powers vested in me by law, do hereby certify that the said The Consolidated Ice Machine Company is a legally organized corporation under the laws of this State.

161 In testimony whereof I hereto set my hand and cause to be affixed the great seal of State. Done at the city of Springfield, this twenty-seventh day of September, in the year of our Lord one thousand eight hundred and eighty-four, and of the Independence of the United States the one

hundred and ninth.

(Signed)

HENRY D. DEMENT,
Secretary of State.

Seal of the State
of Illinois. Seal
Aug. 26th, 1818.

Application for License.

STATE OF ILLINOIS, } ss :
 Cook County, }

To Henry D. Dement, secretary of state :

We, the undersigned, Edmund Jungensfeld, Joseph Koenigsberg and Leo Rassieur, propose to form a corporation under an act of the General Assembly of the State of Illinois, entitled "An act concerning corporations," approved April 18, 1872, and all acts amendatory thereof; and for the purpose of such organization, we hereby state as follows, to wit :

1. The name of such corporation is the Consolidated Ice Machine Company.

2. The object for which it is formed is to manufacture and sell ice-making and refrigerating machinery and all parts of such machinery, to acquire, sell and use patents for such machinery, and licenses to operate thereunder, to manufacture and sell ice and to establish and conduct cold-storage rooms and ice depots.

3. The capital stock shall be two hundred thousand dollars.

4. The amount of each share is one hundred dollars.

5. The number of shares shall be two thousand.

6. The location of the principal office is in Chicago, in the county of Cook, State of Illinois.

7. The duration of the corporation shall be twenty-five years.

EDMUND JUNGENSELD.
 JOSEPH KOENIGSBERG.
 LEO RASSIEUR.

STATE OF MISSOURI, } ss :
 City of St. Louis, }

I, Benjamin A. Suppan, a notary public, in and for the city and State aforesaid, do hereby certify that on the 18th day of July, A. D. 1884, personally appeared before me Edmund Jungensfeld, Joseph Koenigsberg, and Leo Rassieur, to me personally known to be the same persons who executed the foregoing statement, and severally acknowledged that they executed the same for the purposes therein set forth.

In witness whereof, I have hereunto set my hand and seal the day and year above written.

[SEAL.]

BENJAMIN A. SUPPAN,

Notary Public.

My term expires April 17th, 1887.

Return of Commissioners.

To Henry D. Dement, secretary of state of the State of Illinois :

The commissioners duly authorized to open books of subscription to the capital stock of the Consolidated Ice Machine Company, pursuant to license heretofore issued bearing date the 19th day of July, A. D. 1884, do hereby report that they opened books of subscription

to the capital stock of said company, and that the said stock was fully subscribed; that the following is a true copy of such subscription, viz: We, the undersigned, hereby severally subscribe for the number of shares set opposite our respective names, to the capital stock of the Consolidated Ice Machine Company of Chicago, Illinois, and we severally agree to pay the said company, for each share, the sum of one hundred dollars, in such instalments as may be called for (—) the board of directors:

Names.	Shares.	Amount.
J. W. Skinkle.....	250	25,000
Wm. B. Bushnell.....	500	50,000
E. Jungenfeld.....	300	30,000
Jos. Koenigsberg per E. Jungenfeld, his att'y-in-fact.....	250	25,000
Leo Rassieur....	200	20,000
Wm. B. Bushnell, as treasury stock.....	500	50,000

That on the 22nd day of September, A. D. 1884, at the Grand Pacific hotel, northwest corner Clark and Jackson Sts., Chicago, Ill., at the hour of two o'clock p. m., they convened a meeting of the subscribers aforesaid, pursuant to notice required by law, which said notice was deposited in the post-office, properly addressed to each subscriber, ten days before the time fixed therein; a copy of which said notice is as follows, to wit:

To — — —:

You are hereby notified that the capital stock of the Consolidated Ice Machine Company has been fully subscribed, and that a meeting of the subscribers of such stock will be held at the Grand Pacific hotel northwest corner of Clark and Jackson Sts., Chicago, Ill., on the 22nd day of September, A. D. 1884, at two o'clock p. m., for the purpose of electing a board of directors for said company, and for the transaction of such other business as may be deemed necessary.

EDMUND JUNGENFELD,
JOS. KOENIGSBERG,
LEO RAISSIEUR,

Commissioners.

That said subscribers met at the time and place in said notice specified, and proceeded to elect directors, and that the following persons were duly elected for the term of one year as follows: Jacob W. Skinkle, William B. Bushnell, Edmund Jungenfeld, Leo Rassieur.

(Signed)

J. KOENIGSBERG,
LEO. RASSIEUR,
E. JUNGENFELD,

Commissioners.

STATE OF MISSOURI, }
City of St. Louis, } ss:

On this 25th day of September, A. D. 1884, personally appeared before me, a notary public in and for said city in said State, Edmund Jungenfeld, Joseph Koenigsberg and Leo Rassieur and made oath that the foregoing report by them subscribed is true in substance and in fact.

[SEAL.]

BENJ. A. SUPPAN,
Notary Public.

My term expires April 17, 1887.

Proceedings of a meeting of the shareholders of the Consolidated Ice Machine Company held at the Grand Pacific hotel, N. W. corner of Clark and Jackson streets, in the city of Chicago, Illinois, at 2 o'clock p. m. on Monday, September 22nd, 1884, pursuant to notice of the commissioners.

Present: Messrs. Jno. W. Skinkle, Edmund Jungenfeld, Wm. B. Bushnell, Joseph Koenigsberg and Leo Rassieur, all the stockholders.

Mr. J. W. Skinkle was duly elected chairman and Jos. Koenigsberg secretary of the meeting.

It was thereupon resolved to elect four directors for the term of one year, and upon a vote being taken by ballot, the result was declared by Mr. Wm. B. Bushnell who, as teller reported the result to be that the following-named had received the highest number of votes cast, to wit: Jno. W. Skinkle, Wm. B. Bushnell, Edmund Jungenfeld and Leo Rassieur.

The president then duly declared above-named gentlemen elected as the first board of directors to hold office for one year and until their successors are duly elected and qualified.

164 It was next proposed to proceed to the consideration of the by-laws of the company and after mature discussion the following by-laws were unanimously adopted, to wit:

By-laws of the "The Consolidated Ice Machine Company." Adopted September 22nd, A. D. 1884.

SEC. I. In addition to the officers provided for by the statute, to wit: a president, a treasurer, and a secretary, there shall be elected by the board of directors a vice-president and an assistant secretary. Any two offices except president and vice-president may be held by one person.

SEC. II. The president shall preside at all the meetings of the corporation and of its board of directors, and shall execute and carry out all lawful requirements of the board of directors. He shall keep himself informed of the business of the corporation and its finances and shall exercise a general supervision over its affairs. No contract for any machinery made by the company shall be entered into or executed by the president unless he and one other officer of the company agree to and sign the same.

SEC. III. The vice-president shall in the absence of the president, preside at the meetings of the company and of its board. Whenever the president declares himself unable to act as such, by reason of sickness, absence or other good cause or whenever the president declines to act and it is manifestly for the good of the corporation to act and the board of directors deem it necessary that the vice-president should act, the vice-president shall discharge all the duties of the president until relieved by the authority that required him to act.

SEC. IV. The secretary shall discharge all duties lawfully required of him by the board of directors. He shall give notice of every stated or called meeting of the stockholders or directors; he shall keep the minutes of the meeting of the company and also of its board and preserve and subscribe the same in a book to be kept for that purpose, which book shall at all times be open to the inspection of every stockholder. He shall also keep a stock transfer book and a list of all the stockholders and their respective residences. All communications received by him regarding the company or its business, and copies of all answers written thereto, and of letters written by him or by the president regarding the corporation's affairs shall be preserved by him and shall at each meeting of the board be laid before it for the inspection of the directors.

The secretary shall also be required to do soliciting for the company and devote his whole time to the work of the company.
165 In his absence his duties shall be performed by the assistant secretary or by a secretary *pro tem*.

SEC. V. The assistant secretary shall discharge all duties required of him by the board and shall discharge the duties of the secretary whenever the latter is absent from the company's office and he be present thereat. He shall also be required to do soliciting for the company and devote his whole time to the work of the company.

SEC. VI. The treasurer shall receive and receipt for all funds belonging to the company and shall deposit the same in some safe bank to be selected as a depository by the board of directors. He shall pay all sums of money due by the corporation under contracts entered into by the company and all sums of money lawfully ordered to be paid by the board, and a certification of any officer or director of the company to the correctness of any bill and stating the contract for which such bill has been made shall be sufficient warrant for the treasurer to pay the same. The treasurer shall keep at the branch office in St. Louis, subject to be drawn by the vice-president the sum of at least \$5,000 where the funds of the company admit of the same and the vice-president shall render monthly accounts of his outlays and certify to the correctness of the expenditures. He shall keep correct books of account of all receipts and disbursements of the company by double-entry book-keeping, which books shall at all times be open to the inspection of any stockholder. The treasurer shall place before the annual meeting a trial balance and balance sheet from his books, as well as his books and his deposit book duly balanced.

SEC. VII. The directors shall be elected for the term of one year

and until their successors are duly elected and qualified, and such election of directors shall take place at the annual meeting. Within two weeks thereafter the officers of the company shall be elected by the board.

SEC. VIII. The board of directors consisting of four members shall be chosen by the stockholders by ballot from their own number, and in all elections therefor, each shareholder shall have the right to cast as many votes in the aggregate, as shall equal the number of shares of stock held by him in the company, multiplied by the number of directors to be elected at such election, and each shareholder may cast the whole number of his votes either in person or by proxy, for one candidate or distribute them among two or more candidates, and such directors shall not be elected in any other manner.

SEC. IX. The annual meeting of the company shall take place at the office of the company at 11 o'clock a. m. on the second
166 Monday of June in each year, and if that day happens to be a holiday then on the day following.

SEC. X. Special meetings of the stockholders of the company may be held as often as they are called by the president or acting president or a majority of the stockholders. Such meetings shall be held at the office of the company, and the president or secretary shall give each stockholder notice of the above stated or special meetings by mail or telegraph at least five days prior to said meeting and such notice shall state the object of such meeting and no other business than that which is stated in the notice shall be considered in said meeting unless all stockholders be present thereat.

SEC. XI. The board of directors shall meet regularly once every three months, and regular meetings shall be held at the office of the company at 3 o'clock p. m. on the 2nd Monday in September, December, March and June. The board shall meet in special meetings whenever called by any two members of the board, and two days' notice of all such special meetings shall be given by the president or secretary by mail or telegram.

SEC. XII. In case of inefficiency, incompetency or unfaithfulness on the part of any officer or employer, the board of directors or the stockholders holding a majority of stock shall have the power to depose or discharge such officer and elect or appoint another in place thereof if deemed necessary.

SEC. XIII. The treasury stock of this company shall not be disposed of except by resolution of the board of directors and shall not be voted until so disposed of. The holder of any stock who desires to sell the same or any part thereof shall be required to tender such stock to the company and to the stockholders thereof at par for a period of sixty days, and shall only have the right to sell the same in open market after the company and its stockholders have declined to purchase the same. The last clause of this by-law shall be printed on the back of each certificate.

SEC. XIV. These by-laws may be changed or amended at any regular or special meeting of the stockholders by a vote of the

stockholders in which three-fourths ($\frac{3}{4}$) of the stock is voted for such change.

It was next unanimously resolved that each officer or employee engaged in soliciting or other work of the company shall be required to furnish weekly a detailed statement of all expenses incurred for account of the company, and such portions of said accounts shall be entered as expense whenever they have been audited by the board.

167 Upon motion of Mr. Bushnell a seal was adopted as the seal of the company having the words "The Consolidated Ice Machine Company" in the upper half of the rim, the words "Chicago Illinois" in the lower half and a representation of clasped hands in the center.

Thereupon it was resolved to adopt the Jones & Laughlin building, West Lake street, Chicago, Illinois, as the principal office of the company and rooms 6 and 7 of the Empire building No. 919 Olive street, St. Louis city, Mo., as a branch office.

There being no further business before the meeting, the same adjourned.

J. W. SKINKLE, *Chairman.*

J. KOENIGSBERG,

Secretary of the Meeting.

Proceedings of a meeting of the board of directors of the Consolidated Ice Machine Company held at the Grand Pacific hotel, northwest corner of Clark and Jackson streets, Chicago, Illinois, on Monday, the 22nd day of September, A. D. 1884, at 5 o'clock p. m.

Present all the members of the board: Messrs. Skinkle, Bushnell, Jungenfeld and Rassieur.

It was resolved to proceed to the election of officers for the company.

Thereupon Mr. Jacob W. Skinkle was unanimously elected president and treasurer, Mr. Edmund Jungenfeld vice-president, Mr. Wm. B. Bushnell secretary and Mr. Joseph Koenigsberg assistant secretary.

Upon suggestion of Mr. Jacob W. Skinkle and upon motion of Mr. Jungenfeld the Merchants' National Bank of Chicago, Illinois was selected as the depository of the company.

Upon motion of Mr. Bushnell it was resolved to call in one instalment of twenty per cent. on the stock of the company payable ten days after the date of this meeting, one instalment of 20 per cent. payable seventy days after this date, one instalment of 20 per cent. payable four months and ten days after this date, one instalment of 20 per cent. payable five months and ten days after this date, and the balance of 20 per cent. payable six months and ten days after this date, and that the secretary be directed to issue notices in accordance with the above case.

Mr. Bushnell then moved that Mr. Skinkle and he be authorized to employ Mr. V. H. Becker upon such terms and for such period of

time as they may deem proper, subject to the approval of the board, which motion was duly adopted.

168 It was further resolved upon motion of Mr. Bushnell to authorize Messrs. Jungenfeld and Koenigsberg to employ Mr. Hermann Rassbach upon such terms and for such period of time as they may deem proper, subject to the approval of the board.

It was resolved that in the engagement of above-named parties, they be tendered each in addition to their salary the earnings of \$5,000 of stock, with the privilege of purchasing said stock at the expiration of their respective contracts at par, provided they agree to make application for patents for all improvements that may occur to them during their period of employment, at the expense of the company.

Upon motion of Mr. Bushnell, the contract made by Edm. Jungenfeld with the Wainwright Brewery Company in the purchase of its Boyle ice machine and pipe coils, etc., for \$4,500 was accepted by the Consolidated Ice Machine Co. upon the terms set forth in receipt of Sept. 17th.

Thereupon the action of the stockholders in adopting by-laws for the company was duly ratified and the said by-laws adopted as recorded in the previous record.

There being no further business before the meeting it adjourned.
J. W. SKINKLE, *Chairman*.

Proceedings of an adjourned regular meeting of the board of directors of the Consolidated Ice Machine Company held at their principal office, at Chicago, Illinois (room No. 8, No. 16 West Lake St.), December 27th, 1884, at 10 o'clock a. m.

Present: J. W. Skinkle, Leo Rassieur, and W. B. Bushnell, also Mr. J. Koenigsberg.

J. W. Skinkle, president of the company presided and called the meeting to order.

On motion the reading of the minutes of the last meeting of the board of directors was (*dismissed*) with, except such portion of them as related to the making of a contract between this company and Messrs. Rassbach and Becker.

On motion it was ordered that such changes should be made in this record as would authorize the employment by this company of Messrs. Rassbach and Becker with the provision for the allotment of certain stock in this company to them as had been originally understood—namely that each of them (Becker and Rassbach) should have employment for a term of two years from the dates of their respective contracts at the rate of 2,000.00 per annum, if they should prove satisfactory to the company, and that at the expiration of that term if they were either of them still in the employ of the company, the company should have the option of retaining their services for a longer period giving to each of them in addition to their annual salary of 2,000.00 per annum the earnings of \$5,000.00 of stock in this company, with the privilege of its purchase at their option at par.

Upon motion J. Koenigsberg was elected a director in place of Edmund Jungensfeld, deceased.

Upon motion sundry expense accounts were examined and passed by the board.

Upon motion the president of the company was authorized to audit and pass upon all statements of expenses received from employees without referring them to the board of directors.

Upon motion Mr. Eugene T. Skinkle was employed by the board for one year from October 1st, 1884, at the rate \$3,000 per annum.

Upon motion the secretary was ordered to write letters to Messrs. Storm and Wingrove, employes of this company notifying them that we do not need their services any longer.

Upon motion the contract with Messrs. Schenck and Son, Wheeling, which was not in regular form, was approved and accepted.

Upon motion it was ordered that the branch office of this company should be continued for the present, J. Koenigsberg being ordered to make such economical changes in that office as may be proper without injury to our business.

Upon motion Mr. Leo Rassieur was elected vice-president of this company to fill the vacancy caused by the death of Edmund Jungensfeld.

Upon motion the meeting was adjourned.

J. W. SKINKLE, *Chairman*.

Proceedings of a regular meeting of the board of directors of the Consolidated Ice Machine Co. held at the office of the company on Monday, the 9th day of March, A. D. 1885, at No. 16 West Lake street, Chicago, Ills., at 3 o'clock p. m.

Present: Jos. Koenigsberg.

Absent: J. W. Skinkle, W. B. Bushnell and Leo Rassieur.

There being no quorum present the meeting was adjourned to Thursday the 2nd day of April, 1885 at 10 o'clock a. m. No. 513 West Monroe St., Chicago.

J. W. SKINKLE, *Pres't*.

170 Proceedings of the adjourned regular meeting of the board of directors of the Consolidated Ice Machine Co. held at No. 543 West Monroe St. on the 2nd day of April, 1885, at 10 o'clock a. m.

Present: Messrs. J. W. Skinkle, J. Koenigsberg and Leo Rassieur.

Absent: W. B. Bushnell.

The minutes of the meeting of Dec. 27th '84 were read by Mr. Skinkle and duly approved.

Mr. Skinkle then reported to the meeting that the condition of Mr. Bushnell was such that his friends and relatives did not expect his recovery within three months. That he had been taken to a private asylum at Bloomingdale, N. Y. about three weeks ago and that the physicians in charge had expressed their opinion as being that they could cure the patient in about thirteen weeks or one

quarter. Thereupon, on motion of Mr. Rassieur it was resolved that the president take steps to secure the collection of the delinquent assessment upon Mr. Bushnell's stock ; and in order to accomplish such collection, to take legal advice as to Mr. Bushnell's rights, and to take such a course as would protect Mr. Bushnell's interests to the extent that the same had been paid for, and to such an extent as he might be able to pay for ; and to secure the return of such stock as Mr. Bushnell had subscribed for, and could not pay for, in order that the assets of the company might not suffer from his delinquency.

It was further resolved to make an account of such stock as had already been received from the Empire Refrigerating Co. and of such further machinery as they desire to turn over to the Consolidated Ice Machine Co., giving the vouchers in each case indicating the cost of the work.

Mr. Koenigsberg reported the presence in the city of Chicago of a party representing the Southern Brewing Co. of the city of New Orleans, La. for the purpose of making a contract for two new machines. He was authorized to make a contract with them and to receive as a part of the contract price, the two old Empire machines now in the possession of the Southern Brewing Co. and was also instructed to receive said old machines at such a price only as would enable the Consolidated Ice Machine Co. to sell the same without delay and without suffering any loss therefrom.

There being no further business before the meeting it was adjourned.

J. W. SKINKLE, *Pres't.*

171 Proceedings of the regular annual meeting of the stock holders of the Consolidated Ice Machine Co. held at the office of the company, at 16 West Lake street, Chicago, at 11 o'clock a. m. on Monday, June 8th, 1885.

Present : Messrs. J. W. Skinkle, Dr. P. J. Lingenfelder, one of the executors of the estate of Edmund Jungensfeld, deceased, Joseph Koenigsberg and Leo Rassieur.

The primary object of the meeting being to elect directors for the ensuing year, the election took place and resulted in the unanimous election of Messrs. J. W. Skinkle, Joseph Koenigsberg, Dr. P. J. Lingenfelder and Leo Rassieur.

Thereupon it was moved by Leo Rassieur that the following be adopted as a by-law of this company and be numbered by-law No. 11½, to wit :

By-law No. 11½. In case any stockholder fails to pay any installment of stock that has been called in by the board of directors, after due demand of the same as required by the statute, his stock, or so much thereof as may be necessary to make that part which remains unforfeited, full-paid stock, shall be forfeited, and thereupon the same shall be put up for sale at auction, among the remaining stockholders of the company, to be purchased by them individually, or as treasury stock at some meeting of the board of directors—of

which day and hour of sale the party originally holding the said stock shall have five days' notice.

Out of the proceeds of said stock so sold, the unpaid assessments thereon shall first be paid, and the balance shall be applied toward (toward) making the remaining stock held by said party, full-paid stock. The president of the company is authorized and directed to transfer on the books of the company any stock sold as aforesaid.

The object of the meeting having been accomplished, the motion to adjourn was made and seconded, and duly adopted, and thereupon the president declared the meeting adjourned.

J. W. SKINKLE, *Pres't.*

Proceedings of a regular meeting of the board of directors of the Consolidated Ice Machine Co. of Chicago held at its office on Monday, the 8th day of June, 1885, at 3 o'clock p. m.

Present: The whole board, Mess. Skinkle, Koenigsberg, Lingenfelder and Rassieur.

Thereupon the minutes of the adjourned meeting of April 2nd were read and approved.

Next in order the election for officers of the company for the ensuing year, and until the election of their successors took place, and the same resulted in the unanimous election of Messrs.

172 J. W. Skinkle, as president and treasurer, Leo Rassieur as vice-president, and Joseph Koenigsberg as ass't secretary.

It was agreed that the position of secretary should be left vacant to await Mr. Bushnell's restoration and return.

Upon motion it was resolved to increase the salary of Mr. H. L. Hearsam, clerk at the branch office, from \$75.00 per month to \$100.00 per month, such increase to date from January 1st, 1885.

Thereupon, upon motion of Mr. Koenigsberg, it was resolved to increase the salary of Engineer Stocker to \$100.00 per month, the increase to begin on May 1st, 1885.

By-law No. 11½ as adopted by a vote of the shareholders this a. m. was then submitted to the board for adoption, and the same was unanimously adopted.

There being no further business before the same, the same adjourned.

J. W. SKINKLE, *Pres't.*

Proceedings of a regular meeting of the board of directors of the Consolidated Ice Machine Company held at the office of the company on Monday, the 14th day of September, A. D. 1885, at 3 o'clock p. m.

Present: All the members of the board.

Mr. Skinkle, the president, placed before the board a trial balance of the company's books, and a statement of the present shape of the accounts of the different contracts of the company, as also a statement of the investment account, and of the expenditures of the company during the last 12 months, or since the organization of

the company. Also a detailed statement of the salary account expended during said time.

The same were read and duly considered.

Mr. Skinkle then brought up the matter of the machinery furnished by the Empire Refrigerating Co. for the Joplin job, and which has failed to perform its duty, and in consequence has been taken back, and new Boyle machinery substituted, and also the matter of the remainder of the machinery furnished by the Empire Co., stating that it was his understanding and construction of the original contract, that such machinery should only be received and purchased when the same can be made use of by the company.

Mr. Rassieur stated that his understanding, as also the construction of Mr. Jungenfeld of that paragraph of the original contract which has reference to this matter, was that the Consolidated
173 Co. was bound to receive such machinery as it could make available, as soon as the consolidation was effected. That he however was willing that the Joplin work should be overhauled and a valuation fixed upon it such as would be equitable and just to the Consolidated Co.

Thereupon this whole matter was laid over for future consideration, upon Mr. Bushnell's return.

There being no further business, the board adjourned.

J. W. SKINKLE, *Pres't.*

Proceedings of a regular meeting of the board of directors of the Consolidated Ice Machine Co. held at the office of the company, No. 16 West Lake St., on Monday, the 14th day of December, A. D. 1885, at 3 o'clock p. m.

Present: Leo Rassieur, J. W. Skinkle.

There being no quorum present, no business was transacted and the meeting adjourned.

J. W. SKINKLE, *Pres't.*

June 14th, 1886.—No directors of the Consolidated Ice Machine Co. being present in Chicago on this date no meeting was held as provided by by-laws. Noted by order of Mr. Leo Rassieur, vice-pres't letter of this date.

J. W. SKINKLE, *Pres't.*

Proceedings of a called meeting of the board of directors of the Consolidated Ice Machine Co. held at the office of the company on July 20th, 1886, at 9 o'clock a. m., pursuant to the call of the president.

Present: Messrs. J. W. Skinkle, Jos. Koenigsberg, Dr. Lingenfelder and Leo Rassieur.

The minutes of the meeting of Sept. 1885 were read and approved.

It was thereupon moved by Leo Rassieur that there be allowed to the ass't secretary his actual expenses when absent from headquarters, but the sum shall not exceed eight dollars per day, except-

ing when travelling large distances at the instance of the company, or special expenses are occasioned by the closing of contracts or settling therefor, in which cases special report and explanation thereof shall be made and that the president be requested to insist upon weekly reports.

The motion was seconded by Dr. Lingenfelder and adopted.

Mr. J. Koenigsberg then moved that a salary of \$100.00 per month be credited to Mr. Rassieur from January 1st, 1885 for services rendered, and to be rendered the company.

174 The motion was seconded by Dr. Lingenfelder and then adopted, Mr. Rassieur declining to vote.

There being no other business, the board adjourned.

J. W. SKINKLE, *Pres't.*

SEPT. 13, '86.

This being the appointed date for quarterly meeting of directors and there being only present of the board one director, J. W. Skinkle, a meeting was held and adjourned to Dec. 27th '86, 10 o'clock a. m.

J. W. SKINKLE, *Pres't.*

Proceedings of an adjourned regular meeting of the board of directors of the Consolidated Ice Machine Company held at the office of the company on Monday, the 27th day of December, 1886, at 10 o'clock a. m.

Present: Messrs. J. W. Skinkle, Jos. Koenigsberg, and Leo Rassieur.

Mr. W. B. Bushnell being present, informed the board that in view of the advice received from his friends and physicians, as regards the effect upon his system of his continuance in the position of secretary, he has concluded to tender his resignation, and now tendered such resignation.

It appearing from an examination of the record of meeting of June 8th, 1885, that Mr. Bushnell had not been re-elected to the position of secretary, owing to his condition, no further formal action was then taken, or required to be taken upon the matter presented by him. Thereupon the matter of Mr. Bushnell's delinquency on eighty per cent. (80%) installments of the capital stock of the five hundred (500) shares of stock subscribed by him was taken up and considered at his request, and also the matter of his overdraft on the books of the company.

After full discussion of the situation and upon the assumption that he, Mr. Bushnell, was at present unable to pay the delinquent instalments, and upon consideration of the further fact that a forced public sale of the stock would in all probability not realize at present the full amount due on the stock, it was resolved to accept from Mr. Bushnell, if tendered, a power to the board to sell four hundred (400) shares of the said stock, with all its profits and benefits, at not less than par, the proceeds to be applied first to the payment of the delinquent eighty per cent. (80%) and the balance to be applied to the payment of the delinquent eighty per cent. (80%) due on the

one hundred (100) shares not authorized to be sold; and if a premium be realized, then out of such premium, interest shall be paid to the Consolidated Ice Machine Company on such delinquent stock subscription at six per cent. (6%) per annum, from date of maturity thereof to date of payment, and the balance applied to payment of the overdraft.

It was further resolved that if such power was not given or tendered that then the company would have to proceed under its by-laws to a sale to realize its unpaid capital stock.

There being no further business before the board, the same then adjourned.

J. W. SKINKLE, *Pres't.*

March 12th, 1887.—This being the regular date for the quarterly meeting of the directors and there not being a quorum present no meeting was held.

J. W. SKINKLE, *Pres't.*

Proceedings of a regular meeting of the stockholders of the Consolidated Ice Machine Co. held on June 13, 1887, at 11 o'clock a. m. at the office of the company.

Present: J. W. Skinkle, holding 250 shares, Joseph Koenigsberg, holding 250 shares, W. B. Bushnell, holding 500 shares with \$10,000.00 paid thereon, Leo Rassieur as executor of Edmund Jungenfeld, deceased, holding 90 shares, Leo Rassieur as trustee of Carl Jungenfeld, a minor, holding 70 shares, Leo Rassieur as proxy of Sophia Sander representing 70 shares, and Leo Rassieur holding in his own right 200 shares.

Absent: Philip Stock as curator of Anna Jungenfeld, minor, holding 70 shares.

It was then moved to proceed to the election of directors for the ensuing year, which motion was adopted, and the following gentlemen were nominated for directors, to wit:

Mr. J. W. Skinkle by Leo Rassieur.

Mr. Leo Rassieur by Jos. Koenigsberg.

Mr. P. J. Lingensfelder by Jos. Koenigsberg.

Mr. Jos. Koenigsberg by Leo Rassieur.

Mr. Fred'k P. Reid by Mr. W. B. Bushnell.

Thereupon on motion of Mr. Rassieur by-law No. 9 was on a unanimous vote, amended so as to read as follows, to wit:

Sec. IX. The annual meeting of the company shall take place at the office of the company at 9 o'clock a. m. on the second Monday of September in each year, and if that day happens to be a holiday, then on the day following.

Upon motion of Mr. Rassieur it was then resolved that the election of directors for the ensuing year be postponed until the second Monday of September, A. D. 1887, at 9 o'clock a. m. at the office of the company.

There being no further business before the company, it adjourned.

J. W. SKINKLE, *Pres't.*

Proceedings of a regular meeting of the board of directors of the Consolidated Ice Machine Co. held at its office at 3 o'clock p. m., June 13th, 1887.

Present: Mr. J. W. Skinkle, Jos. Koenigsberg, Esq., and Leo Rassieur.

Absent: Dr. P. J. Lingensfelder.

Also present: Mr. W. B. Bushnell.

The president brought the matter of the faithful services of Mr. T. E. Hughes before the board and read that part of a letter written to Mr. Koenigsberg which refers to Mr. Hughes. After full discussion, the matter of his re-employment was left with the president under resolution heretofore adopted.

Mr. Skinkle then brought up the matter of the payment of the delinquent instalments on Mr. Bushnell's stock. Mr. Rassieur moved that the stock of Mr. W. B. Bushnell be forfeited for failure to pay the second, third, fourth and fifth instalments of stock each of 20 % thereof, due demand thereof having been made, and that said stock, or so much of said stock as may be necessary to make the remaining stock full paid, shall be put up at auction for sale at the next meeting of the stockholders to be held at the office of the company on Monday, September 12th, 1887, at 10 o'clock a. m., and that the secretary be directed to give notice of said proposed sale to Mr. W. B. Bushnell and to Mr. Frederick Reid as his representative.

Mr. J. W. Skinkle seconded the motion.

The resolution was then voted upon and unanimously carried.

There being no further business before the meeting it adjourned.

J. W. SKINKLE, *Pres't.*

Proceedings of an adjourned meeting of the Consolidated Ice Machine Co. of Chicago held at its office at 9 o'clock a. m. on Monday, September 12th, 1887.

Present: Messrs. J. W. Skinkle, Jos. Koenigsberg, W. B. Bushnell and Leo Rassieur, the latter appearing in his own right and as executor of the estate of Edmund Jungenfeld, deceased, as trustee of Carl Jungenfeld, a minor, and as proxy of Miss Sophia Sander.

Absent: Phil. Stock, Esq.

177 The minutes of the meeting of June 13th, 1887, were read by President Skinkle, and duly approved.

Thereupon the meeting proceeded to the election of the directors, and after canvassing the ballots cast the result was as follows, viz:

	J. W. Skinkle.	Jos. Koenigsberg.	P. J. Lingensfelder.	W. B. Bushnell.	Leo Rassieur.
Mr. J. W. Skinkle voted as follows.....	250	250	250	.....	250
W. B. Bushnell " " ".....	500	500	.....	500	500
Leo Rassieur " " ".....	200	200	199	.....	201
Edmund Jungenfeld's estate voted as follows	90	90	90	.....	90
Carl Jungenfeld, trustee " " ".....	70	70	70	.....	70
Sophia Sander " " ".....	70	70	70	.....	70
Jos. Koenigsberg " " ".....	250	250	250	.....	250
	1,430	1,430	929	500	1,431

Total votes cast, 5,720.

The president thereupon declared the following as duly elected directors of the company for the ensuing year: Messrs. Jacob W. Skinkle, Joseph Koenigsberg, P. J. Lingensfelder and Leo Rassieur.

The hour of 10 o'clock a. m. having arrived, the matter of the sale of Mr. W. B. Bushnell's stock under the resolution of the board of directors passed June 13th, 1887, was brought before the meeting.

After full discussion of the matter it was resolved upon motion of Leo Rassieur seconded by W. B. Bushnell that when this meeting adjourns, it shall adjourn to Monday, October 3rd, 1887, at 10 o'clock a. m. at this office and that the sale ordered to take place today be postponed until 10 o'clock a. m. October 3rd at this office.

It was then resolved that the meeting adjourn to meet Monday, October 3rd, 1887, at 10 o'clock a. m. at this office.

J. W. SKINKLE, *Pres't.*

Proceedings of a regular meeting of the board of directors of the Consolidated Ice Machine Co. held at its office on Monday, September 12th, 1887, at 3 o'clock p. m.

Present: J. W. Skinkle, Jos. Koenigsberg and Leo Rassieur.

Absent: P. J. Lingensfelder.

178 The minutes of meeting of June 13th were read and approved.

The new board having been elected it was resolved to proceed to the election of officers and such election was then had and resulted in the unanimous choice of

J. W. Skinkle as president and treasurer,

Leo Rassieur as vice-president,

Jos. Koenigsberg secretary and

Eugene T. Skinkle assistant secretary.

The account for expenses of Mr. Koenigsberg, secretary, from February 25th to August 31st, (1897), in the sum of \$3,164.05 was then laid before the meeting and discussed and thereupon the said account was duly allowed, but with the distinct understanding

that the resolution of July 20th 1886 regarding his allowance shall be carried out without further explanation or discussion, unless his accounts be rendered weekly and satisfactory explanations be made of excessive outlays.

There being no further business before the meeting, the board adjourned.

J. W. SKINKLE, *President*.

Proceedings of an adjourned meeting of the stockholders of the Consolidated Ice Machine Co. held at its office, 26 West Lake street, Chicago, Ills., on Monday, October 3rd (1897), at 10 o'clock a. m.

(Present) in the chair.

President J. W. Skinkle holding 250 shares.

Leo Rassieur " 200 "

Leo Rassieur, executor " 90 "

Leo Rassieur, trustee " 70 "

Sophia Sander by proxy " 70 "

Leo Rassieur " 70 "

W. B. Bushnell by

Trustee Reid

Mr. Skinkle then read parts of records of meetings of Dec. 27th 1886, June 13th and September 12th (1889) referring to stock subscribed by W. B. Bushnell Esq.

Mr. Reid asked for an interview with Mr. Leo Rassieur and after the same was had Mr. Skinkle directed the sale of 500 shares of stock forfeited to the company under its by-laws for failure by Mr. W. B. Bushnell to pay the four (4) unpaid instalments of stock each of 20% due from him thereon.

Thereupon the stock was offered for sale and the announcement made that the purchaser would be (acquired) by twelve o'clock to pay \$5,000.00 in cash or certified check, for account of the whole of the stock or in proportion, and if not paid at that time the sale would be declared void and a resale made thereof at 2 o'clock p. m.

Mr. Reid then gave notice that he protested against the sale and that although he was the trustee of Mr. W. B. Bushnell he had had no notice of the resolution ordering a sale. He was told that his principal had notice and was present at the meeting of September 12th at which the resolution of postponement of sale was adopted as shown by the records of the company.

Mr. Reid then withdrew and Mr. Jos. Koenigsberg representing 250 shares appeared in the meeting while the first 100 shares were being offered for sale, and after the same had been cried the same were bought by the company for \$8,000.00.

The next 100 shares were then offered and sold to same purchaser for \$8,000.00.

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There being no further business before the meeting the same adjourned.

J. W. SKINKLE, *Pres't.*

Proceedings of a meeting of the board of directors of the Consolidated Ice Machine Co. held at its office, 26 West Lake street, on Monday, October (2rd), 1887, — p. m.

Present: J. W. Skinkle, Leo Lassieur and Jos. Koenigsberg.

The following resolution was presented before the meeting and passed:

Resolved, That in the event the company is successful in getting the contract of the Knickerbocker Brewing Company of New York the president be authorized to execute a bond of this company to said company for the faithful carrying out of said contract, and indemnifying said company against all infringement suits in the full amount of the contract, and Messrs. J. W. Skinkle and Leo Rassieur be requested to sign said bond and all other bonds of this company as its sureties.

There being no further business before the meeting the board adjourned.

J. W. SKINKLE, *Pres't.*

180 The pres't was also authorized at this meeting to sign all bonds in the future that might be necessary to give on contract for the company.

Proceedings of a regular meeting of the board of directors of the Consolidated Ice Machine Co. held at its office, in Chicago, Illinois, on Monday, December 12th, 1887, at 10 o'clock a. m.

Present: Messrs. J. W. Skinkle, Jos. Koenigsberg, and Leo Rassieur.

Absent: Dr. P. J. Fingenfelder.

After receiving a report from the president of the condition of the Schaller Bros. apparatus and their disposition and position it was resolved to authorize the secretary to make them the following proposition in order to compromise matters of difference, to wit:

Messrs. Schaller Bros., Cincinnati, O.

GENTLEMEN: We propose to insulate the rooms of your brewery at our expense, you to give us permission and room to do so. We further agree to make such modifications in your refrigerating machine and plant as we may deem desirable at our expense and we propose further that in July to August 1st 1888 a 30 days' trial run shall be made of the machine and the duty it performs, by us, and you to lend your aid and assistance to a full and fair trial, and if this trial shows that our machine can and does substantially com-

ply with our contract dated October 23rd 1886, you shall pay us the cost of the insulation and the balance due us on this contract.

It was further resolved not to proceed with construction of Bergner & Engel's machine, until terms of contract had been definitely settled by signatures of contract.

The president then placed before the board his resignation as president and treasurer, and stated that he had no desire to embarrass the company or take advantage of its present position, but that in view of the death of Mr. E. Jungenfelder and the impairment of the mental capacity of W. B. Bushnell and the unexpected labor thrown upon his shoulders in addition to that which he agreed to assume, he felt compelled to call attention to his situation and to decline to further carry the responsibility which he had been carrying so long.

Upon motion of Mr. Rassieur, who stated that he had long expected such action, as perfectly proper and justified under the circumstances the resignation was accepted.

It was then moved by Mr. Koenigsberg to elect Mr. J. W. Skinkle again as president and treasurer and to request him to serve the company for at least one more year at an annual salary of five thousand dollars (\$5,000.00.)

181 Upon a vote being taken it was resolved to elect Mr. J. W. Skinkle as president and treasurer and to postpone the matter of fixing his salary until the next meeting when a full board could pass upon same and do him full justice.

A resolution was adopted that the president be authorized to sign for the company any and all bonds which it may be necessary to give on contracts for the company.

Thereupon the board adjourned.

J. W. SKINKLE, *Pres't.*

Proceedings of a regular meeting of the board of directors of the Consolidated Ice Machine Co. held on Monday, March 12th, 1888, at 3 o'clock p. m., at the office of the company, in Chicago, Ill.

Present: The whole board.

The president read the minutes of last meeting and thereupon on motion the same were approved.

Upon motion of Dr. Lingerfelder the resolution to fix the salary of the president at \$5,000.00 per annum from December 1st 1887 postponed from last meeting, was brought up and unanimously adopted.

The president then reported that the Schaller Bros. differences had been temporarily settled by Mr. Rassieur by a contract in writing which had enabled us to overhaul the apparatus and place it in elegant order, but that time would be required to show whether the machine would accomplish the guaranteed work.

It was then moved by Mr. Rassieur in view of the expiration of our shop lease on May 1st 1888, that the president be authorized to rent such shop facilities, and if possible such office facilities in con

nection therewith as may be for the advantage of the company, which motion was thereupon adopted.

It was next moved by Mr. Rassieur in view of the possible and proposed enlargement of our shop facilities that the president be authorized to dispose of the \$50,000.00 treasury stock or any part thereof at not less than par to such person or persons as he may deem desirable associates as stockholders.

There being no further business before it, the board adjourned.

J. W. SKINKLE, *Pres't.*

MONDAY, June 11th, 1888.

Mr. J. W. S. pres't being present. No quorum being present, the meeting of the board of directors of the Consolidated Ice Machine Co. was adjourned.

J. W. SKINKLE, *Pres't.*

182 Regular annual meeting of the stockholders of the Consolidated Ice Machine Co. held at its office, West Eighteenth St. viaduct, September 10th, 1888.

In accordance with by-laws of said company the meeting was called to order at 10 o'clock a. m. by J. W. Skinkle.

Present J. W. Skinkle only 250 shares.

Proxies presented:

Leo Rassieur 200 shares.

P. J. Lingensfelder executor, Leo Rassieur executor estate of E. Jungenfeld 90 shares.

P. J. Lingensfelder, trustee, Leo Rassieur, trustee, Carl Jungenfeld 70 shares.

Total 610 shares.

J. W. Skinkle nominated for directors for ensuing year P. J. Lingensfelder, Leo Rassieur, J. Koenigsberg and J. W. Skinkle.

Vote being announced, each nominee received the unanimous vote of 610 shares, being the number represented in said meeting. Whereupon the president J. W. Skinkle declared the above-named parties duly elected as directors for the ensuing year, or until such time as their successor or successors, shall have been duly elected.

There being no other business before the meeting it was declared adjourned.

J. W. SKINKLE, *Pres't.*

Proceedings of a regular meeting of the board of directors of the Consolidated Ice Machine Company held at its office on Monday, September 10th, at 3 o'clock p. m., pursuant to the by-laws.

Present: J. W. Skinkle, president; and,

Absent: The remaining members of the new board.

There being no quorum present, the meeting was adjourned to Monday September 24th, 1888, at 11 o'clock a. m.

J. W. SKINKLE, *Pres't.*

Proceedings of an adjourned meeting of the board of directors of the Consolidated Ice Machine Company held on Monday, September 24th, 1888, at 11 o'clock a. m., pursuant to adjournment.

Present: J. W. Skinkle, Jos. Koenigsberg, and Leo Rassieur.

Absent: P. J. Lingenfelder.

183 After a discussion of the balance-sheet, laid before the board by the president, the meeting was adjourned to Tuesday the 25th inst. at 9 o'clock a. m.

J. W. SKINKLE, *Pres't.*

Proceedings of an adjourned meeting of the board of directors of the Consolidated Ice Machine Company held at its office on Tuesday, September 25th, 1888, at 9 o'clock a. m., pursuant to adjournment.

Present as in yesterday's meeting.

Thereupon Mr. Skinkle submitted the request (to) Mr. Bushnell to be employed by the company, and upon motion of Mr. Rassieur it was resolved to decline his request under the conditions named by him.

It was then stated by Mr. Skinkle that Mr. Bushnell wanted the directors to state what they proposed to do about the stock capital contributed by him, and thereupon it was resolved that Mr. Bushnell be notified that the stock originally subscribed by him has been forfeited for failure to pay past-due instalments, and sold to pay for such instalments, and bought by the company for its (prosecution) on October 3rd, 1887.

That he be further notified that the board tenders him the 500 shares of stock bought as above set forth for the sum of \$40,000.00, and interest at 6 % from the average date when the instalments became due, and that such offer be kept open for acceptance for 60 days from this date, but no longer.

It was next unanimously resolved to elect Mr. J. W. Skinkle president and treasurer, Leo Rassieur vice-president, Jos. Koenigsberg secretary, and Eugene T. Skinkle assistant secretary.

Mr. Koenigsberg then brought up the matter of an increase of his salary, claiming that the contract of 1884 was no longer binding upon him, and that his services were worth more per annum than \$2,000.00.

Thereupon the consideration and action upon such matter was postponed till the meeting in September, 1889, when the board could take such action as the result of the year's labor justified.

J. W. SKINKLE, *Pres't.*

Proceedings of a regular meeting of the board of directors of the Consolidated Ice Machine Company held at its office, W. 18th St. viaduct, of Dec. 10th, 1888, at 9 o'clock a. m., pursuant to the by-laws.

184 Present: The whole board and Mr. J. W. Skinkle, presiding.

Thereupon the minutes of meeting of Sept. 10th, '88, and of meet-

ing of Sept. 24th, 1888, as also of meeting of Sept. 25th, '88, were read and duly approved.

The form of contract submitted to this company by the De La Vergne Ref. Co., the Frick Co. and the National Ice Mch. Co., dated Nov. —, was thereupon read and considered, as well as the communications of the said companies regarding the options given out by each. Mr. Rassieur thereupon moved that the contract as submitted be ratified and approved with the understanding that the written copies of the option are to be submitted within six days after the contract goes into effect, which motion was seconded and adopted.

It was next resolved that this company designate Mr. J. W. Skinkle as its representative to represent this company in the Standard Refrigerating and Ice Machine Co. and authorize him to subscribe for 260 shares of stock in said company, and to agree upon all details of organization of said corporation, and also upon prices, manufacturers' profits, and selling prices in said company under said contract.

Thereupon the meeting was adjourned, there being no other business before the meeting.

J. W. SKINKLE, *Pres't.*

Proceedings of a regular meeting of the board of directors of the Consolidated Ice Machine Co. held at its office, West 18th Street viaduct, on Monday, March 11th, 1889, at 9 o'clock a. m.

Present: J. W. Skinkle, Joseph Koenigsberg and Leo Rassieur.

Absent: P. J. Lingenfelder.

Mr. Koenigsberg presented a verbal report regarding the organization of the Standard Ice Machine & Refrigerating (—) in West Virginia, and also stated that he had subscribed for the benefit of this company 26 shares of said stock par value of \$10 per share. The report in detail was duly considered and thereupon the meeting was adjourned until to (—) morning at 12 o'clock m.

J. W. SKINKLE, *Pres't.*

MARCH 12TH, 1889.

Proceedings of an adjourned meeting of the board of directors of the Consolidated Ice Machine Co. held at its office at 12 o'clock noon pursuant to adjournment.

Present and absent as in yesterday's meeting.

Whereupon Mr. Koenigsberg moved the adoption of the following resolution, viz:

185 Whereas Mr. Skinkle earnestly believes that the prices adopted by the Standard Ice Machine & Refrigerating Company as selling prices will finally result in excluding from the market such manufacturers as demand the same, and whereas, this board does not feel justified in agreeing to such prices in justice to its stockholders: Now, therefore be it resolved that the action of Mr. Koenigsberg in agreeing to such prices be ratified and confirmed providing the Standard Ice Machine & Refrigerating Co. reduces its prices on brine refrigerating plant below its published prices, also

ice-making plants, and place the price for direct-expansion plants on the same footing as brine refrigerating plants of same sizes. Which motion was seconded and adopted.

It was then moved, seconded and adopted that Mr. Koenigsberg be authorized to have executed and delivered licenses of all patents in part or whole, owned by the company, with power to issue license to the other company named in contract of Nov. 28th, 1888, if above prices be reduced as requested. The meeting then adjourned.

J. W. SKINKLE, *Pres't.*

MONDAY, June 10th, 1889.

Present: J. W. Skinkle.

Absent: The remaining members of the board of directors of the company.

No quorum being (*requested*) adjournment was taken to Monday, June 17th, 1889.

J. W. SKINKLE, *Pres't.*

Proceedings of an adjourned regular meeting of the board of directors of the Consolidated Ice Machine Company held at its office (W. 18th St. viaduct), in Chicago, on Monday, June 17th, '89, at 9 o'clock a. m., pursuant to adjournment.

Present: J. W. Skinkle, Joseph Koenigsberg and Leo Rassieur.

Absent: P. J. Lingenfelder the remaining director.

It was thereupon resolved on motion of Mr. Koenigsberg to authorize the officers to execute and deliver licenses of all patents in part or in whole owned by this company, to the remaining companies named in the contract of Nov. 28th, '88 which motion was duly seconded by Leo Rassieur, and thereupon adopted, Mr. J. W. Skinkle not voting.

It was further resolved to request the Standard Ice Machine & Refrigerating Co. to reduce prices heretofore by it agreed upon, inasmuch as it seems futile and useless to contend for business with the manufacturers who have not contracted with the Standard Co.

Thereupon it was moved by Leo Rassieur, that the written
186 ratification of all absent stockholders be obtained for the making of the contract of Nov. 28th, '88, and proceeding thereunder on the part of this company, which motion was seconded and adopted.

J. W. SKINKLE, *Pres't.*

Office of the Consolidated Ice Machine Co., Chicago, Illinois.

MONDAY, September 9th, 1889—ten (10) o'clock a. m.

The stockholders' meeting set and appointed for this day convened at the place and hour aforesaid. There being no quorum present the meeting was adjourned to reconvene on call of the secretary.

E. T. SKINKLE, *Ass't Sec'y.*

Proceedings of a special meeting of the stockholders of the Consolidated Ice Machine (—) held at the office of the Co., in Chicago, Ills., on Thursday, Oct. 3d, 1889, at 10 o'clock a. m., pursuant to adjournment and call of secretary.

Present: J. W. Skinkle pres't and Joseph Koenigsberg, Fred. Widmann and Leo Rassieur.

J. W. Skinkle, Jos. Koenigsberg, Fred Widmann and Leo Rassieur were thereupon nominated as directors and duly elected as such each having received all the votes cast at the election and being more than a majority of all the votes of the company.

There being no other business before the company the meeting adjourned.

J. W. SKINKLE, *Pres't.*

Proceedings of a meeting of the board of directors of the Consolidated Ice Machine Co. held at its office, in Chicago, Oct. 3d, 1889, at 2 o'clock p. m., pursuant to call of the president.

Present: The whole board.

Thereupon it was resolved that the present officers of the company be re-elected for the ensuing term.

Mr. Rassieur moved that in consideration of the statement of the president regarding Mr. Hughes' satisfactory services he be credited with the sum of five hundred dollars and that he be paid hereafter at the rate of \$2,000 per annum for his services, which motion was unanimously adopted.

Thereupon it was resolved that the salary of Mr. Koenigsberg be fixed at the rate of \$2,000 cash and a credit of \$1,60 per year on his overdraft of account providing he promptly renders the accounts of the branch office to the general office during the year.

The meeting then adjourned.

J. W. SKINKLE, *Pres't.*

187 Meeting (regular) for board of directors of the Consolidated Ice Machine Co., Monday, Dec. 9th, 1889.

Present: (Only) J. W. Skinkle.

No quorum being present the meeting was adjourned till the next regular meeting of the board, March 10, 1890.

J. W. SKINKLE, *Pres't.*

Meeting (regular and adjourned) of board of directors of the Consolidated Ice Machine Co., at its office, Chicago, March 10th, 1890.

Present: (Only) J. W. Skinkle.

No quorum. Adjourned to March 17th, 1890.

J. W. SKINKLE, *Pres't.*

Proceedings of an (adjourned) meeting of the board of directors of the Consolidated Ice Machine Co. held at its office in Chicago, March 17th, 1890.

Present: The whole board.

The matters and business of the company were fully discussed.

Upon motion of Mr. Koenigsberg it was resolved to direct and order the president to sign, execute and acknowledge as pres't of this Co. the contract and bond with the Consumers' Hygiene Ice Co. of New York for \$110,000, said papers being now before the board for their consideration and the president was further instructed and authorized to sign all bonds on all contracts for this company which it may be necessary to give. Mr. Skinkle reported that in the course of obtaining a contract from the Consumers' Pure Ice Co. of Chicago for \$90,000 he found it necessary to become a member of the Union League Club of this city whose admission fee is \$200, and annual dues \$80, and that such membership would give him opportunities of coming in contact socially with a large number of the most enterprising citizens of Chicago, and thereupon on motion of Mr. Rassieur it was resolved that such expenditure for admission and annual dues be borne by the company.

There being no further business before the board it adjourned.

J. W. SKINKLE, *Pres't.*

Meeting (regular) for board of directors of the Consolidated Ice Machine Co. at its office in Chicago, Monday, June 9th, 1890.

Present: J. W. Skinkle, only.

There being no quorum present the meeting was adjourned till the next regular meeting of the board for Monday Sept. 8th, 1890.

J. W. SKINKLE, *Pres't.*

188 Regular annual meeting of the stockholders of the Consolidated Ice Machine Co. at its office in Chicago, Monday, Sept. 8th, 1890.

Personally present: J. W. Skinkle 250 shares.

Stock represented by proxies, viz:

Fred Widmann.....	70 shares.	
Leo Rassieur	200	"
Estate of E. Jungensfeld, deceased	90	"
	—	
	360	"
	610	"

Thereupon J. W. Skinkle, Joseph Koenigsberg, Leo Rassieur and Fred Widmann were nominated for directors, and each receiving the whole number of votes cast at the election and being more than a majority of all the stock of the company they were declared duly elected. There being no other business presented the meeting adjourned, subject to the call of the president.

J. W. SKINKLE, *President.*

Regular (adjourned) meeting of the directors of the Consolidated Ice Machine Co. at its office in Chicago, Monday, Sept. 8th, 1890.

Present: J. W. Skinkle, only.

There being no quorum present the meeting was adjourned subject to the call of the president.

J. W. SKINKLE, *Pres't.*

Proceedings of a special meeting of the board of directors of the Consolidated Ice Machine Company held at its office, W. 18th Street viaduct, in the city of Chicago, on Tuesday, the 14th day of October, 1890, at 9 o'clock a. m., pursuant to the call of the president, Mr. J. W. Skinkle.

Present: J. W. Skinkle, Frederick Widmann and Leo Rassieur.

Absent: Jos. Koenigsberg.

Upon motion of Mr. Widmann, Leo Rassieur was requested to act and did act as secretary *pro tem.*

Mr. Skinkle then stated to the board that the difficulty attending the making of collections on the contractors of the company, owing in part to the stringency of the money market and in part to various other causes, made it impossible for him to continue paying the liabilities of the company as they mature; that such was the case although the assets far exceeded the liabilities of the company, the outstandings alone, not including the plant and merchandise, being in excess of \$550,000.00 and the liabilities about \$420,000.00.

189 Thereupon, upon the motion in that behalf duly made, seconded and unanimously adopted, it was resolved that the president of this company be and he is hereby authorized, empowered and directed to make an assignment for the benefit of all the creditors of the company, of all the assets thereof of every kind and nature regardless of their situation, to Robert E. Jenkins or such person as may be selected, and may be able and willing to assume the said trust and qualify as such assignee.

There being no further business before the board, it adjourned.

LEO RASSIEUR,

Sec'y pro Tem.

STATE OF ILLINOIS, } ss:
County of Cook, }

John H. Miller, being first duly sworn, deposes and says that he has read over the foregoing copy of the record of the proceedings of the stockholders and board of directors of the Consolidated Ice Machine Company, and has carefully compared the same with the original record of said proceedings, and that the same is an exact and true copy of the record of the proceedings of the stockholders and board of directors of the Consolidated Ice Machine Company.

JOHN H. MILLER.

Subscribed and sworn to before me this 13th day of April, A. D. 1893.

[SEAL.]

ALICE G. NELSON,
Notary Public.

STATE OF ILLINOIS, } ss :
County of Cook, }

William G. Adams, being first duly sworn, deposes and says that he has read over both the original record of the proceedings of the stockholders and board of directors of the Consolidated Ice Machine Company and the foregoing copy of said proceedings, and has carefully compared the said copy with the said original record, and that the said copy is an exact and true copy of the record of the proceedings of the stockholders and board of directors of the Consolidated Ice Machine Company.

WILLIAM G. ADAMS.

Subscribed and sworn to before me this 13th day of April, A. D. 1893.

[SEAL.]

ALICE G. NELSON,
Notary Public.

This indenture, made and entered into this fourteenth day of October, A. D. 1890, by and between "The Consolidated Ice
190 Machine Company" manufacturing ice machines at W. 18th Street viaduct (*Chicago*) of Chicago, in the county of Cook and State of Illinois, party of the first part, and Robert E. Jenkins, of Chicago, in the county of Cook and State of Illinois, party of the second part, witnesseth :

Whereas, the said party of the first part is indebted to divers persons in divers sums of money, as is more particularly enumerated and set forth in a list marked Schedule "A," and made a part hereof; and

Whereas, the said "The Consolidated Ice Machine Company," party of the first part, has become and is at present unable to pay said indebtedness, and is desirous of providing for the payment thereof by an assignment of all its property and effects (except such as may be exempt to it by the laws of the State of Illinois), for that purpose, as provided by an act of the General Assembly of the State of Illinois, entitled "An act concerning voluntary assignments, and conferring jurisdiction therein upon county courts," approved May 22, 1877, in force July 1, 1877;

Now, this indenture witnesseth, that the said party of the first part, in consideration of the premises, and in consideration of one dollar, in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, sold, assigned, transferred and set over, and by these presents does grant, bargain, sell, assign, transfer and set over to the said party of the second part, and his successors in trust, all and singular, the lands, tenements, hereditaments and appurtenances, goods, chattels, accounts, promissory notes, bonds, bills, debts, choses in action, claims, demands, property and effects of every kind and description, real,

personal and mixed, belonging to the said party of the first part, or in which it has any right or interest, or which are held by any person or persons for it, or in trust for it (except such as is exempt from levy and sale under execution, under the laws of the State of Illinois), the same being fully and particularly enumerated and described in an inventory, under the oath of said party of the first part, marked Schedule "B," and made a part hereof; also the books of account of said party of the first part, and all papers, documents and vouchers relating to *(his)* business, dealings, property or affairs;

To have and to hold the same, and each and every part or parcel thereof, unto the said party of the second part, his successors and assigns, in trust, nevertheless, and to and for the uses, interests and purposes following, that is to say:

The said party of the second part shall take possession of the property hereby assigned, or intended so to be, and shall, with all convenient diligence, proceed to sell and dispose of
191 the same, as is provided in said act concerning voluntary assignments, and convert the same into money, and shall, also, with all reasonable diligence, collect and receive all and singular, the debts, dues, bills, bonds, notes, accounts, and balances of accounts, judgments, securities, claims and demands hereby assigned, and out of the proceeds of said sales and collections make such payment or payments to the creditors of the said party of the first part, as shall from time to time be directed to be made by the county court, as provided in the act aforesaid, and if, after the payment of all costs, charges and expenses attending the execution of the trust hereby created, and the payment and discharge in full of all lawful debts due and owing by the said party of the first part, of every kind and description that may have been proved against it, as provided in said act, any part or portion of the proceeds of said sales and collections shall remain in the hands or control of the said party of the second part, or his successors in trust, he shall return the same to the said party of the first part, its heirs, executors and administrators; and if, after payment in full as aforesaid, there should remain in the hands or possession of said party of the second part, or his successors in trust, any part or portion of the property or effects hereby assigned, which shall not have been sold, collected, or converted into money, he shall return, reassign and redeliver the same to the said party of the first part, its heirs, executors and administrators, by proper, full and complete instruments of reconveyance or reassignment.

And in furtherance of the premises, the said party of the first part does hereby make, constitute and appoint the said party of the second part its true and lawful attorney, irrevocable, with full power and authority to do all acts and things which may be necessary in said premises to the full execution of the trust hereby created, and to ask, demand, recover and receive of and from all and every person or persons, all property, debts and demands, due, owing and belonging to the said party of the first part, and to give acquittances and discharges for the same, to sue, prosecute, defend and implead

for the same, and to execute, acknowledge and deliver all necessary deeds, instruments and conveyances. And the said party of the first part does hereby authorize the said party of the second part to sign the name of the said party of the first part to any check, draft, promissory note, or other instrument in writing, which is payable to the order of the said party of the first part, or to sign the name of the party of the first part to any instrument in writing whenever it shall be necessary so to do to carry into effect the object, design and purpose of this trust.

192 The said party of the second part doth hereby accept the trust created and reposed in him by this instrument, and covenants and agrees to and with the said party of the first part, that he will faithfully and without delay execute the trust hereby created according to the best of his knowledge, skill and ability.

In witness whereof, the said parties have hereunto set their hands and seals, the day and year first above written, and the said party of the first part has caused its president to append its name and corporate seal hereto.

THE CONSOLIDATED ICE [SEAL.]
MACHINE CO.,

[CORPORATE SEAL.] By J. W. SKINKLE, *Pres't.*

ROBERT E. JENKINS. [SEAL.]

STATE OF ILLINOIS, }
Cook County, } ss :

I, J. Sherman Root, a notary public in and for the said county, in the State aforesaid, do hereby certify, that Jacob W. Skinkle, president of the Consolidated Ice Machine Company, and Robert E. Jenkins personally known to me to be the same persons whose names are subscribed to the foregoing instrument, appeared before me this day, in person, and acknowledged that they signed, sealed and delivered the said instrument as their free and voluntary act and deed, for the uses and purposes therein set forth, and the said Jacob W. Skinkle acknowledged said instrument as such president as the free and voluntary act of said corporation, for the uses and purposes therein set forth.

Given under my hand and notarial seal, this fourteenth day of October, A. D. 1890.

[NOTARIAL SEAL.]

J. SHERMAN ROOT,
Notary Public.

Indorsed: "8970. Voluntary assignment for benefit of creditors. The Consolidated Ice Machine Co., debtor, to Robert E. Jenkins, assignee. State of Illinois, Cook county, ss. This instrument was filed for record in the office of the recorder of said Cook county on the 14 day of Oct., A. D. 1890, at 4 o'clock p. m., and recorded in Book 2891 of Records, on page 442. John Stephens, recorder. Filed Oct. 14, 1890, 4 20 p. m. Henry Wulff, clerk. Filed Feb. 3, 1897. T. L. Crawford, clerk."

STATE OF ILLINOIS, } ss:
County of Cook, }

I, Henry Wulff, clerk of the county court of Cook county, in the State aforesaid, do hereby certify that the above, foregoing and annexed is a true, correct and complete copy of deed of assignment filed with the clerk of said court at 4.20 p. m. October 14th, A. D.

1890, in the matter of the voluntary assignment of the Consolidated Ice Machine Company, gen'l No. 8970 of said court, all of which appears from the records and files at my office.

In witness whereof, I have hereunto set my hand and affixed the seal of said county court, at my office in the city of Chicago, in said county, this nineteenth day of August, A. D. 1891.

HENRY WULFF,
Clerk of the County Court.

To further maintain the issues on its part, the defendant, The De La Vergne Refrigerating Machine Company, offered in evidence the depositions of Adolf Bender, Louis W. De La Vergne, Louis Baron, Chas. H. Cone and Joseph Keonigsberg, together with all exhibits to the said depositions, which said depositions were taken in the city of New York on the 10th, 11th and 12th days of November, A. D. 1896, before Alex. Cameron, a notary public in and for the city, county and State of New York, and filed in this cause on the 18th day of November, A. D. 1896, and which said depositions and exhibits are as follows, to wit:

Circuit Court of the United States, Eastern Division of the Eastern
Judicial District of Missouri.

LEO RASSIEUR	}	Cause 3695.
vs.		
THE DE LA VERGNE REFRIGERATING MACHINE CO.		
FREDERICK WIDMANN	}	Cause 3696.
vs.		
THE SAME DEFENDANTS.		
THE GERMAN SAVINGS INSTITUTION	}	Cause 3697.
vs.		
THE SAME DEFENDANTS.		
EDWARD MALLINCKRODT	}	Cause 3698.
vs.		
THE SAME DEFENDANTS.		
LEO RASSIEUR, Trustee,	}	Cause 3699.
vs.		
THE SAME DEFENDANTS.		
ANNA JUNGENSELD	}	Cause 3700.
vs.		
THE SAME DEFENDANTS.		

P. J. LINGENFELDER, Adm'r,

vs.

THE SAME DEFENDANTS.

} Cause 3701.

JACOB SKINKLE, to the Use of the MERCHANTS' NA-
tional Bank of Chicago.

vs.

THE SAME DEFENDANTS.

} Cause 3726.

194 Depositions taken, pursuant to agreement between counsel for the several plaintiffs and counsel for the De La Vergne Refrigerating Machine Company, this tenth day of November, 1896, before Alexander Cameron, Jr., a notary public in and for the city and county of New York.

The taking of this testimony was adjourned by consent from the office of Hubert A. Banning to the office of the De La Vergne Refrigerating Machine Company, and proceeded as follows:

Present: Mr. Charles H. Aldrich and Mr. Hubert A. Banning, counsel for the defendant company, and Leo Rassieur, Esq., counsel for the plaintiffs.

ADOLPH BENDER, a witness produced, sworn and examined on behalf of the defendant company deposed and testified as follows:

Direct examination.

By Mr. ALDRICH:

Q. 1. You may state your name, residence and occupation.

A. Adolph Bender; 159 W. 118th street, New York city, general manager of the De La Vergne Refrigerating Machine Company.

Q. 2. How long have you been connected with the defendant company?

A. Since April, 1886.

Q. 3. In what capacity were you related to the company in the years 1890, 1891 and 1892?

A. As a salesman.

Q. 4. You may state whether or not you had charge of the sales department of the company.

A. Not at that time, I was a coworker but not manager of the sales department at that time—you might call it his assistant.

Q. 5. In that capacity did you have knowledge and information concerning all the sales made by this company?

A. Oh yes.

Q. 6. You may state, if you know, when this company became the owner of the Boyle patent.

A. If my memory serves me right I think it must have been either in 1888 or 1889.

Q. 7. When did you first hear of a contract or have any knowledge of a contract between Mr. John C. De La Vergne and the so-called Consolidated Ice Machine Company, or some of its stockholders?

A. Not until I became a trustee of this company.

Q. 8. At what date was that?

A. I think it was in January 1894.

Q. 9. I will ask you whether or not, so far as you know, any property, money, business or other thing of value of any kind or description whatsoever ever came into the possession or subject to the control of this company through or under the contract to which I have referred?

Counsel for plaintiffs objected to the question on the ground that it was incompetent, immaterial and irrelevant.

A. Not to my knowledge.

Q. 10. Something has been said on other occasions—the time and occasion of the saying of which is immaterial at this time—about the defendant company having acquired the business and good will of the Consolidated Ice Machine Company through and by virtue of the contract purporting to bear date April 16th, 1891—now I will ask you to state what the facts are with reference to such a statement, whether it is true or otherwise, so far as you know.

Counsel for the plaintiffs objected on the same grounds as before.

A. I have never heard of anything or do I know of anything which would in any way show that by having acquired, if so the business of the Consolidated Ice Machine Company—from which it could be inferred that our company could, at any time have gained anything thereby—to which I in particular refer to the arguments used by salesmen, in competing for contracts with other companies.

Q. 11. If I understand your answer then, Mr. Witness, so far as you know, nothing of value has ever come to this company?

Counsel for the plaintiffs objected on the same grounds as before and also on the ground that the question is leading.

A. Absolutely nothing.

Q. 12. You may state, Mr. Witness, whether it would have been possible for this company to have succeeded in getting contracts as the successor of the Consolidated Ice Machine Company through representations to that effect, without your having a knowledge of it.

Counsel for the plaintiffs objected on the same grounds as before.

A. Certainly not.

Cross-examination.

By Mr. RASSIEUR:

X Q. 1. Your company in 1890, 1891 and 1892 had a branch establishment in St. Louis, Missouri, had it not?

A. Yes, sir—that is, an agency.

X Q. 2. Had it not a branch manufacturing establishment there?

A. No, sir.

X Q. 3. Was it not engaged in keeping up a manufacturing plant on the corner of 8th and Park avenues, in the city of St. Louis during that time?

A. I hardly think so.

196 X Q. 4. What did you call that which was being carried on on the southeastern corner of 8th and Park avenues in the city of St. Louis?

A. In the first place, I don't think we had this place in that year, if my memory serves me right. But if we did it was never for the purpose of manufacturing machines, or anything pertaining thereto, but simply a shop such as we had in other places, where we have agencies for the purpose of doing a quick repair work, thereby obviating delays in cases where by reason of break-downs machines could have become inoperative.

X Q. 5. Had you any such repair shop or other establishment in the city of Chicago during those years?

A. We did not.

X Q. 6. You have erected quite a number of plants in the city of Chicago, have you not?

A. A few—not quite a number.

X Q. 7. Also a few in Milwaukee?

A. Yes, more so than in Chicago.

X Q. 8. The Consolidated Ice Machine Company had erected quite a number of plants in the city of New York and in the neighboring territory—during the years preceding the 14th of October, 1890, had it not?

A. Very few indeed, according to my knowledge.

X Q. 9. It had erected the ice plant at the New York Steam Company, had it not?

A. Yes, but this was after 1890.

X Q. 10. When was it?

A. Somewheres in the summer I should say of that year—by having said 1890 I have in mind the season which covers our business which certainly closes in the spring of each year—because contracts are taken between the fall and winter and early spring, very rarely later, that is, during the summer.

X Q. 11. I am speaking of the contracts taken by the Consolidated Ice Machine Company before its failure or assignment made on the 14th day of October, 1890—during the five years preceding that date—and now, will you please answer the question again as to whether or not the Consolidated Ice Machine Company had or had not taken quite a number of contracts in the city of New York and the contiguous territory, including such territory as Boston, Trenton, Philadelphia, Baltimore, and Chester, Pennsylvania, and other places equally contiguous to the city of New York?

A. I can and must say no, when I compare the business done by the Consolidated Ice Machine Company in that particular year with the business done by the De La Vergne Refrigerating Machine Company. For instance, in the city of Boston in that year,
197 the Consolidated Ice — Company sold in the city of Boston to my certain knowledge one machine, and that was to the Quincy Market Cold Storage Company. Now, as a matter of fact there is not another Consolidated machine in Boston today outside of this one.

In Trenton an ice plant was sold and the only one in that city. As to Philadelphia, I can't recall any particular sales which were made in that year, but do believe that one or two machines have been sold. In Baltimore, none that I know of. I know nothing about Chester, Pennsylvania, never heard of it—if there was one sold there, it must have been a small affair, otherwise I surely would have known of it.

In New York, I do know of the sale of an ice plant made to the New York Steam Company—and perhaps two more sales that I can't think of just now. The reason I do remember these sales mentioned is because we ourselves had more or less to do with the fixing up of these plants in that very year, 1890, by reason of their improper working—that is why I can recall it. Such for instance as in Boston and the city of New York and in Trenton and Philadelphia, all of which did not work well. People came to us and applied for assistance and help, that is why I know it.

X Q. 12. In other words your company furnished the unfavorable opinion with reference to these plants immediately after the failure of the Consolidated Ice Machine Company.

Counsel for the defendant company objected on the ground that the question was immaterial, irrelevant and incompetent.

A. Not at all.

X Q. 13. Did you not say, Mr. Bender, a moment ago, that your company took hold of these plants and performed work upon them immediately after the failure of the Consolidated Ice Machine Company and that such work enables you to recall these plants?

Counsel for the defendant company objected to the question on the same grounds as before and also on the ground that the answer of the witness was the best evidence of what he said, and also on the further ground that the question fails to distinguish between the witness' statement of fact that the machines did work and the question that the De La Vergne Refrigerating Machine Company furnished the unfavorable opinions—a distinction which must be obvious as it seems to counsel.

A. I certainly did not.

X Q. 14. What did you say with reference to what calls to your mind the plants put up by the Consolidated Ice Machine Company in 1890?

198 Counsel for the defendant company objected on the same grounds as before.

A. Simply the fact that it was commonly known in the trade that all the plants erected by the Consolidated Ice Machine Company in this particular year had all failed to come up to their guarantee; firstly, because they were not completed in time and secondly, because they didn't work properly after they had been completed, and of which our company in particular received positive information by reason of its close contact with the very people who had bought these plants, including a few cases where we had to refuse to accept

the contracts on the terms which the Consolidated Ice Machine Company had at the time taken in competition with ourselves.

I would like to add another case that I had omitted before, namely, the Consumers' Ice Company of this city.

X Q. 15. Did your company do any work on the plant of the Quincy Market Cold Storage Company of Boston?

A. Yes; at the very same time the Consolidated Ice Machine Company erected their machine which was a hundred-ton machine.

X Q. 16. Was that an individual contract of the De La Vergne Refrigerating Machine Company?

A. Yes sir; in fact the Quincy Market Cold Storage Company awarded a contract to us and one to the Consolidated Ice Machine Company in that particular year.

X Q. 17. Did you put up any other machines in that year in Boston?

A. Yes, quite a few, I think.

X Q. 18. Name them, or the parties for whom they were put up?

A. Instead of speaking from memory now, I would like to be allowed to refer to our list of customers—because we took so many contracts in that year that it would be difficult for me to state accurately, unless I refer to the list.

Counsel stated that the witness be permitted to refer to his list.

A. (Witness refers to his books.) Edward Habich & Company, Boston, American Brewing Company of Boston—two machines.

X Q. 19. What were their capacity?

A. Fifty tons each.

X Q. 20. Put up in 1890?

A. Yes sir; this list here is the authority for so stating. Then there is McCormack Company, John Roessler, William Smyth & Company, the Suffolk Brewing Company, Fobs, Hayward & Company—that is all.

X Q. 21. What contracts had you in Trenton in that year?

A. None.

199 X Q. 22. What contracts in Baltimore in that year?

A. I will have to go over the same book again, sir (witness looks at the book). I may state as regards Trenton that the Trenton contract was not given out in Trenton but in New York for Trenton.

X Q. 23. What was the size of that plant in tonnage?

A. If I remember rightly I think it was a 50-ton plant, but I am not positive about it. Let me see, in Baltimore (witness looks at list again) there was George Brehm, George Guenther and the National Brewing Company—that is all.

Mr. ALDRICH: I would suggest that we might save time by putting in evidence if you desire it a printed list of the customers to which the witness has referred in giving his testimony and which as I understand it gives the dates of the several contracts—I am sure I have no objection to counsel for the plaintiffs so doing, if he desires it. I simply make this suggestion.

The WITNESS: The years given there are the years of the completion, so that the contract might have been taken in 1890 and only been completed in 1891. I only call your attention to this point. It distinctly states the year of the completion.

Mr. RASSIEUR: I think it is unnecessary to make that list a part of the record, for the reason that I have all that I desire from the witness in that direction.

By Mr. RASSIEUR:

X Q. 24. Can you state what plants were erected in the year 1890 in the city of New York by your company?

A. The New York Hygeia Ice Company plant, the New York Steam Company's plant on 18th street, Beadleston & Woerz, the Consumers' Brewing Company—two (\$100-ton plants—George Ehret, Howard & Childs, H. Koehler & Company, William Ottmann & Company, Joseph Stern, United Dress-Beef Company, the Plaza hotel, Plaza hotel—two instead of one in the year, and Gustav Helmetters, Runkel Brothers. Two orders from the New York Hygeia Company that year and one order from the New York Company instead of the steam company as stated before; A. Hnepfel & Son—that is all.

X Q. 25. The Consolidated Ice Machine Company had a branch office during that year in the city of New York, had it not?

A. I suppose so, I am not quite sure about it.

X Q. 26. Who was in charge of their business in this city?

A. Joseph Koenigsberg.

X Q. 27. Did he work for the De La Vergne Refrigerating Machine Company in 1891?

A. I don't believe he ever worked for them; I don't think so.

200 X Q. 28. You have no knowledge then of the contracts made by this company, the De La Vergne Refrigerating Machine Company, with Mr. Koenigsberg for the selling of the machines of the De La Vergne Refrigerating Machine Company?

A. Absolutely none.

X Q. 29. I mean during the year 1890.

A. Certainly not.

X Q. 30. You will not say that no such contract was made?

A. I do say so; you ask me whether I knew of the existence of a contract by which Mr. Koenigsberg was to sell the De La Vergne Refrigerating Machine Company's machines in 1890 or 1891?

X Q. 31. Yes, for the De La Vergne Refrigerating Machine Company in 1891, I ask you.

A. I again say no.

X Q. 32. Then I ask you whether you would say that there was any such contract—first as to the year and as to whether you had any such knowledge, and secondly, whether there was any such contracts.

A. Not for the selling of machines of the De La Vergne Refrigerating Machine Company, certainly not—so far as my knowledge goes.

X Q. 33. When did the De La Vergne Refrigerating Machine

Company begin the manufacturing of machines under the Boyle patent, under which the Consolidated Ice Machine Company had been operating?

A. Never.

X Q. 34. Did the De La Vergne Company, and the words I have just used applies to the De La Vergne Refrigerating Machine Company, have any machines constructed under that patent by any other machine shop during the year 1891?

A. Not to my knowledge, I certainly would know if they had.

X Q. 35. Were any machines constructed by Featherstone Sons, of Chicago, Illinois, for the De La Vergne Refrigerating Machine Company during the year 1891?

A. Not to my knowledge; it could not have been any object to do so, as we own the patents and could have made machines better than the Featherstones if we saw fit.

X Q. 36. Did you buy any machines from the Featherstone Sons, or did the De La Vergne Refrigerating Machine Company buy any machines from the Featherstone Sons during the year 1891?

A. Not to my knowledge.

X Q. 37. You say you did work on the plants of the Consolidated Ice Machine Company erected in this city, viz: for the New York Steam Company and the Consumers' Hygeia Ice Company of New York?

A. I did not make any such statement—it is simply this, we had been called upon by these people to do such work.

X Q. 38. And you did not do any work for them, did you?

A. Yes, we did do work—some work for the Consumers' Ice Company, but to what extent I do not know.

201 X Q. 39. Did you do any work for the New York Steam Company on the plant put up by the Consolidated Ice Machine Company?

A. Nothing further than some expert work, if my memory serves me rightly.

X Q. 40. By the term expert work, you mean to say that you examined the plant and gave your opinion thereon, is that it?

A. No, sir, that is not it.

X Q. 41. Please explain then.

A. It was to point out the existing defects, why his plant would not work—it was not a matter of opinion, sir, it was a matter of fact.

X Q. 42. Did you do any work of any kind, or rather did your company do any work of any kind on the plant of the Trenton Hygienic Ice Company in the year 1891?

A. I will answer the question: firstly, the same as in the other cases, namely, it was expert work if I do remember rightly I think we did some other work later on, but I cannot distinctly state whether it was in 1890, 1891 or 1892, because that plant never works, so far as my memory serves me, rightly, for years.

X Q. 43. You probably are not aware then of the fact that there was a trial of the matter of that plant's working or not and of a judgment in the United States circuit court that it did work?

A. Oh, yes, I am, but such trial, as far as my memory goes, did not by any means establish the fact that the machine and plant sold by the Consolidated Ice Machine Company did perform the work as specified in the contract, in fact it was a well-known matter of fact that the decision of the court was an altogether surprising one; I remember the details of it very particularly.

X Q. 44. Were you or any of the employees of the De La Vergue Refrigerating Machine Company witnesses in that case against the assignee of the Consolidated Ice Machine Company?

A. As far as I am personally concerned I was not, as to the other members of our organization if they did happen to be I was not aware of it.

X Q. 45. Did your company do any work for the Philadelphia Warehouse and Cold Storage Company on its plant, erected by the Consolidated Ice Machine Company in the year 1891?

A. I think some expert work, but I am not positive about it.

X Q. 46. Does that answer of yours also apply to the Consumers' Ice Manufacturing Company of Philadelphia?

A. I could not say as to that.

X Q. 47. Does it apply to the Darley Park Brewing Company of Baltimore?

A. I don't think so.

202 X Q. 48. Does it apply to the Hygienic Ice Company of Washington, D. C.—did you do any work on that plant in the year 1891?

A. I think we were called in to do some work, in fact I know we did.

X Q. 49. Did you do any work on the Union Ice Manufacturing Company's ice plant of the Consolidated Ice Machine Company erected by it in 1890 at Pittsburg, Pennsylvania?

A. I think we did—if that is the same plant in which Mr. Shoemaker had been connected, because I remember some correspondence between this company here and Mr. Shoemaker.

X Q. 50. The work performed by you there was what kind of work?

A. Expert work.

Redirect examination.

By Mr. ALDRICH:

R. D. Q. 1. On the occasion of the taking of evidence in Chicago in this case counsel for the plaintiffs stated that one reason why the assets of the Consolidated Ice Machine Company had not paid more than they have and been insufficient to discharge the debts of that company, was that the De La Vergue Refrigerating Machine Company and its officers or employees had sought to prevent the assignee from collecting the assets of the company by expressing unfavorable opinions concerning the work under contract at the time of the failure of the Consolidated Ice Machine Company, and for which that company had not yet received pay. I will ask you whether or not the officers or employees of this company were en-

gaged in any such efforts to prevent the assignee from realizing the full value of the assets, so far as you know?

Plaintiffs' counsel objected to the question as leading, and also on the ground that it was incompetent, immaterial and irrelevant.

A. Certainly not.

R. D. Q. 2. In speaking of expert opinion and services rendered these various companies, I will ask you whether these services were volunteered by the officers and employees, or whether they were sought for by the owners of the plant?

A. Well, I hardly think we volunteered any services, for we were in the habit of charging \$50 per day. I furthermore very distinctly remember that our services were very seriously solicited by the respective people I refer to.

R. D. Q. 3. And solicited, as I understand your cross-examination because the plants owned by the people referred to would not work and were out of order.

Counsel for the plaintiffs objected to the question as leading, and also on the ground that it was incompetent, immaterial and irrelevant.

203 A. Decidedly so, because it was common knowledge that these very plants never did work.

R. D. Q. 4. You have been asked with reference to Mr. Koenigsberg's connection with this company and the sale by this company of the Consolidated ice machines or machines made under their patent. Now, you may state what relations Mr. Koenigsberg did occupy to the company, if any?

A. I very distinctly remember that one day Mr. De La Vergne came to me and asked me what I thought of employing Mr. Koenigsberg—

Objected to by plaintiffs' counsel as hearsay evidence.

R. D. Q. 5. Only state Mr. Witness what the result was, or the facts as to his relations to the company?

A. He was not employed by this company, because some of the gentlemen objected to it. As far as my memory goes then, after having applied to us Mr. Koenigsberg applied to somebody else to accomplish the same purpose, and sold not the De La Vergne but the Featherstone machines, and not having the necessary means to erect such plants, he again applied to the De La Vergne Refrigerating Machine Company for assistance for erecting such plants. Now, if any contract ever existed between Mr. Koenigsberg and the De La Vergne Refrigerating Machine Company, I certainly am unaware of it further than I have stated.

R. D. Q. 6. You mean further than as stated with reference to the erection of machines bought by Koenigsberg and erected by this company?

A. No; I would not even say he had machines erected by this company; because I do know and distinctly remember that Mr. Koenigsberg had his own engineers, which he brought over to work

these defunct plants, and that he only got from this company very likely what he could not get anywheres else—because he wanted credit, I think.

Recross by Mr. RASSIEUR :

R. X Q. 1. You read the Brewers' Journal, do you not ?

A. No, sir, I have not time for that.

R. X Q. 2. Do you not read any of it ?

A. Yes, I read certain parts that are marked by a boy in blue pencil, but nothing else, and then, only what refers to the sale of machines ; which I can prove by submitting to you any number of such journals.

R. X Q. 3. You keep the Brewers' Journal here, do you not ?

A. Yes, sir, we keep every journal published in the interest of the brewers' industry.

R. X Q. 4. And you kept these journals in the year 1891, did you not ?

A. Undoubtedly.

204 R. X Q. 5. Did you ever see this advertisement in the Brewers' Journal (handing paper to witness) ?

A. No, sir, I have not until now so far as my memory serves me. Yes, I have read it for the first time I think today.

Paper offered in evidence marked New York Exhibit 1 of November 10th, 1896.

R. X Q. 6. Will you now say that the De La Vergne Refrigerating Machine Company have made no arrangements with Mr. Koenigsberg for the sale of machines built under the Boyle patent commonly known as the Consolidated Ice Machine Company's machines in the year 1891 ?

A. Yes, certainly. I say so, because if there has been any contract made with Mr. Koenigsberg at that time to this effect I think assuredly I would have known it.

Redirect by Mr. ALDRICH :

R. D. Q. 1. You do know, do you, Mr. Witness, that this company never built any Consolidated ice machines ?

A. Yes, sir, absolutely ; because we never thought anything of it, and because we own the patents.

Signature waived.

LOUIS E. DE LA VERGNE, a witness called, sworn and examined on behalf of the defendant company deposed and testified as follows :

By Mr. ALDRICH :

Q. 1. You may state your name, residence and occupation ?

A. Louis E. De La Vergne, Ozone Park, Queens county, State of New York. I don't know what my occupation is at present. I

have been up to recently treasurer of the De La Vergne Refrigerating Machine Company.

Q. 2. Of what State are you a citizen?

A. Of New York State.

COUNSEL FOR THE PLAINTIFFS: I am not sure that I asked the citizenship of the witnesses at the trial in Chicago; or of Mr. Bender, the witness who has just left the stand.

Now I simply desire to show that they are citizens and reside within one hundred miles of the trial, there is no objection, I suppose to that.

DEFENDANT'S COUNSEL: No, sir, we have no objection.

Q. 3. How long have you been connected with the De La Vergne Refrigerating Machine Company?

A. Eight or nine years.

Q. 4. What offices or positions have you held with reference to the affairs of the company?

A. First I was vice-president, back of that I was elected trustee of the company, that was in 1888 and then I was appointed
205 vice-president, and then I was treasurer and vice-president.

Q. 5. What offices did you hold during the year 1890, 1891 and 1892?

A. Treasurer and vice-president, I think so.

Q. 6. I understand you were also a trustee during that period?

A. Yes, I was.

Q. 7. As I understand it, the office of trustee corresponds to what is known as director of the corporation in this State, does it not?

A. Yes, sir.

Q. 8. I will ask you, Mr. De La Vergne, what action, if any, the stockholders of the De La Vergne Refrigerating Machine Company ever took with reference to the purchase or proposed purchase of the assets of the Consolidated Ice Machine Company.

Objected to by plaintiffs' counsel as incompetent, immaterial and irrelevant.

A. None.

Q. 9. I refer in this case to the stock in that company, the good will of that company, or any property that had ever belonged to the company, or of the stockholders thereof.

Same objection by plaintiffs' counsel.

A. None.

Q. 10. You may answer the same question in reference to any action ever taken by the board of trustees or directors of the De La Vergne Refrigerating Machine Company.

Same objection as before by plaintiffs' counsel.

A. There was no action taken.

Q. 11. Please state what, if any, property or thing of value of any description whatsoever the De La Vergne Refrigerating Machine

Company ever received under the contract of April 16th, 1891, which is made the cause of action in these various plants.

Same objection as before by plaintiffs' counsel.

A. Nothing except the stock.

Q. 12. You may state whether the company ever received its stock or whether that has always remained in the custody of John C. De La Vergne.

A. I know nothing about its being received except on hearsay.

Q. 13. You may state whether or not it has ever been referred to in any of the directors' meetings as having been received.

Same objection as before by plaintiffs' counsel.

- A. I never heard it mentioned.

206 Q. 14. Are you familiar with the records of the stockholders and directors of this company?

A. I have read them over.

Q. 15. And in making these statements as to the action of the stockholders and directors you may state whether you speak from your knowledge as an officer and attendant of the meeting and also from your examination of the books.

Plaintiffs' counsel objected to the question on the ground that the record is the best evidence and also that it was immaterial, irrelevant and incompetent.

A. Both.

Counsel for the defendant company does not desire to withhold from counsel for the plaintiffs the records but here produces them and states that with reference to these records as well as to the ledgers, books and other papers of the defendant company that he does not desire to take them to St. Louis at the time of the trial, but that he freely offers them to the counsel for the plaintiff, and states that they will have joint copies made of any portion that may be deemed material to this controversy, the only ground upon which they desire to be spared taking them to St. Louis is, that it is inconvenient to the business of the company to have them absent from the company's files.

Defendant's counsel further requests plaintiffs' counsel to make a more specific designation of the books and papers desired, and he hereby states to counsel for the plaintiffs that this offer includes also the contracts that have been made heretofore with Joseph Koenigsberg.

Q. 16. I hand you, Mr. Witness, what purports to be a certified copy of the articles of incorporation of what was then the De La Vergne & Mixer Refrigerating Machine Company and I ask you if that is a copy of the original incorporation of the defendant company.

A. (Witness looks at paper.) I should say it was the same as I have seen,

Paper referred to offered in evidence and marked New York Exhibit 2, November 10th, 1896.

Defendant's counsel here asks counsel for the plaintiffs to state if he has any objection to the certification of the paper above mentioned and that if he has, he would like him to state the same, as he does not wish any technical objections to be raised hereafter, if he can avoid it.

Q. 17. You may state, Mr. Witness, when the name of this company was changed—you are at liberty to look at the records if you so desire.

(Witness looks at papers.)

207 Plaintiffs' counsel desires the evidence of payment made by the De La Vergne Refrigerating Machine Company to Messrs. H. W. Guernsey, Ashbel P. Fitch, and John R. Waters and Mr. John C. De La Vergne, while engaged in the matter of arranging for the purchase of the assets of the Consolidated Ice Machine Company; subject to the rights of its creditors and its assignee who had possession thereof. This also includes a call for the evidence of the payment of the services of Mr. Banning of Chicago who acted for the defendant in this case in the matter of the making of the contract of April 16th, 1891.

Counsel for the defendant company stated that Mr. De La Vergne or the proper officer of the company would be requested to search for and give to counsel for the plaintiffs the books containing the entries on this subject, if there were any.

Q. 17. Have you found when the name of this company was changed?

A. I found here something that refers to it—there was a resolution that was offered in regard to it.

Q. 18. You may state whether the company ever changed its name or not?

A. Yes, it was changed.

Q. 19. To what name?

A. To the De La Vergne Refrigerating Machine Company.

Q. 20. What was the original capital stock of the company?

A. \$350,000.

Q. 21. Has the capital stock of the company since been increased?

A. Yes, sir, it has.

Q. 22. When?

A. Feb. 4th, 1891, I think it was—it was ordered to be increased.

Q. 23. In what records do you find this fact stated?

A. In the stockholders' book.

Q. 24. At what pages?

A. At page 29.

Q. 25. You may state in your answer all the pages that include the notice of the meetings for the purpose of making such increase and also the meeting at which the increase was voted?

A. Page 29, January 3rd, 1891, and it was acted upon February 4th, 1891, and is subscribed on pages 29 and 30.

Pages referred to offered in evidence and marked. Witness reads them in evidence as follows.

NEW YORK, *February 4th*, 1891.

A meeting of the stockholders of the De La Vergne Refrigerating Machine Company was held at the office of the company, foot of East 138th street, New York city, on the 4th day of February, 1891, at 10 o'clock in the forenoon pursuant to the following notice :

208 Notice is hereby given that the meeting of the stockholders of the De La Vergne Refrigerating Machine Company will be held on the 4th day of February, A. D. 1891, at the office of the said company at the foot of East 138th street in the city of New York at 10 o'clock in the forenoon to determine whether the capital stock of said company shall be increased to \$2,000,000, the additional stock to be divided into shares of \$100 each.

Dated January 3rd, 1891.

J. C. DE LA VERGNE,
LOUIS E. DE LA VERGNE,
CHARLES H. CONE,
JOHN G. GILLIG,
LOUIS BLOCK, *Trustees.*

Present :

John C. De La Vergne.....	3,100 shares.
Louis E. De La Vergne.....	1 share.
Charles H. Cone.....	1 share.
Carl H. Schultz.....	250 shares.
Adolf Bender.....	40 shares.

Making a total of.....3,392 shares.

Being more than two-thirds of all the shares of the stock of said company.

The meeting was organized by choosing J. C. De La Vergne the trustee, chairman, and Charles H. Cone, another of the trustees, secretary.

The chairman read the call for the meeting. The chairman rendered a statement showing that the entire capital of said company was \$350,000, all actually paid in and issued in purchase of the property necessary for the company's business; that the debts and liabilities of the company did not exceed the sum of \$967,193.59.

The following resolution was offered by Louis E. De La Vergne :

"Resolved, That the capital stock of the De La Vergne Refrigerating Machine Company be increased from \$350,000 to \$2,000,000, the additional stock to be divided into shares of \$100 each and to be issued by the officers of the company at the direction of the board of trustees."

The resolution being seconded by Carl H. Schultz, the meeting proceeded to ballot on the same. Upon counting the ballots it was found that 3,392 ballots and more than two-thirds of the capital stock were in favor of said resolution, and no ballots opposed.

209 It appearing that a sufficient number of votes had been given in favor of said resolution, the chairman declared the same adopted. Upon motion of Louis E. De La Vergne seconded by Adolf Bender the meeting was declared adjourned.

(Signed)

CHARLES H. CONE, *Secretary*.

Q. 26. I ask you if you know to state what was the purpose of this increase of the capital stock?

Objected to by plaintiffs' counsel on the ground that it is immaterial, irrelevant and incompetent.

A. One of the main reasons was that we would like to have more money to do business with.

Q. 27. State whether or not it had any relation to the purchase by this company of the stock or some of the stock of the Consolidated Ice Machine Company?

Objected to by plaintiffs' counsel on the same grounds as before, and also upon the further ground that it is not the best evidence for proving that purpose.

A. I never heard of it.

Q. 28. If such had been its purpose you may state Mr. De La Vergne, whether or not in your opinion you would have heard of it?

Objected to by plaintiffs' counsel on the same grounds as before.

A. I should have heard of it.

Q. 29. What relation, if any, did you bear to Mr. John C. De La Vergne, deceased?

A. I was his brother.

Q. 30. Mr. De La Vergne in the examination of Mr. Bender, counsel for the plaintiff- interrogated him with reference to Mr. Koenigsberg's connection with this company, I will ask you whether certain contracts were entered into with Mr. Koenigsberg?

A. Yes, there were two contracts with Mr. Koenigsberg.

Q. 31. I hand you the papers and ask you if they are the contracts to which you refer (papers handed witness)?

A. Yes, sir; one is dated May 1st, 1891 and the other November 1st, 1892.

Contract of May 1st, 1891 referred to by witness is offered in evidence and marked New York Exhibit 4 of Nov. 10, 1896. The second contract referred to by the witness is also introduced into evidence and marked New York Exhibit 3, of November 10th, 1896.

210 Q. 32. Did the De La Vergne Refrigerating Machine Company ever construct any machines known as the Consolidated Ice Machine Company's machines?

A. No, sir.

Q. 33. Did they ever purchase any such machines and if so, from whom—state all the facts that you know in reference to any rela-

tions by this company with the Consolidated Ice Machine Company?

A. We never purchased directly any machines from the Consolidated Ice Machine Company ourselves. Mr. Koenigsberg did the buying and the making of the contracts with Mr. Featherstone.

Q. 34. What relation did you have to it—I mean with reference to the erecting of the machine, or the furnishing of material therefor, etc.?

A. We furnished the piping and Mr. Koenigsberg and his engineers did the erection.

Q. 35. Are you able to state how many such machines were erected or with which this company has any relation whatever?

A. Seven machines sold to five different people.

Q. 36. And do you know from whom Mr. Koenigsberg purchased the machines that you bought up, if so, you may state?

A. Featherstone Sons, I think.

Q. 37. I hand you a bill purporting to be rendered to that firm by Mr. Joseph Koenigsberg and purporting to describe the machines, and I ask you whether or not these are the machines referred to in your testimony (paper handed to witness)?

A. They are.

Paper offered in evidence and marked New York Exhibit 5 of November 10th, 1896.

Q. 38. Do you know, Mr. De La Vergne, when the Featherstones bought the assets of the Consolidated Ice Machine Company?

A. No, sir.

Q. 39. I ask you Mr. De La Vergne to state what, if any relation these contracts with Mr. Koenigsberg and the erection for him and with him of these machines, had to the contract of April 16th, 1891, upon which these actions are brought against the defendant company?

A. Nothing that I know of. I find upon examining the directors' book No. 1 of this company under date of June 25th, 1883, that proceedings were had which resulted in the changing of the name of the firm.

Cross-examination.

By Mr. RASSIEUR:

X Q. 1. What is your interest in the stock of the company, Mr. De La Vergne?

A. Twenty-five shares.

X Q. 2. How many shares did you hold in the stock of the \$350,000 which was the original stock of the company?

A. One share.

211 X Q. 3. Who holds the largest number of shares in the increased stock?

A. The estate of John C. De La Vergne.

X Q. 4. What number of shares does it hold?

25—240

A. Fifteen thousand I think it was—(witness refers to his memorandum) 15,928 shares.

X Q. 5. Was any record made of this agreement of May 1st, 1891, between the De La Vergne Refrigerating Machine Company and Joseph Koenigsberg, either in the stockholders' record, or the record of the board of trustees?

A. I don't know of any.

X Q. 6. Was any record made of the contract of November 1st, 1892, in either of these books?

A. I don't know of any being made.

X Q. 7. Were you aware of the making of this contract of May 1, 1891?

A. Yes, sir.

X Q. 8. Can you explain the reason for Mr. De La Vergne making a contract, which required Joseph Koenigsberg to faithfully and diligently serve the De La Vergne Refrigerating Machine Company in its business, or in the business of the Consolidated Ice Machine Company?

A. No, I cannot, I know I objected to the contract being made at the time.

X Q. 9. What you objected to was the making of this contract with Mr. Koenigsberg, was it not?

A. Yes, sir.

X Q. 10. And you cannot say why it was made in this way, requiring Mr. Koenigsberg to serve in the business of the Consolidated Ice Machine Company, if so directed?

A. I couldn't explain that part of it; I am not enough familiar with it.

X Q. 11. Did you ever know what the reason was for making such requirement in this contract?

A. No, sir.

X Q. 12. And you do not recall asking for an explanation as trustee?

A. No, sir; I do not.

X Q. 13. Did you ask that this matter be brought before the board of trustees?

A. No, sir.

X Q. 14. Why not?

A. I couldn't say why.

X Q. 15. Do you mean to say you don't know why you didn't bring this matter of the making of this contract with Mr. Koenigsberg before the board of trustees?

A. No, sir; I know I objected to it—that was all that was done about it.

X Q. (L.) 6. Is it not a fact that this one share that you held in the company was a present from your brother, and held in trust for you?

A. I don't know whether he presented it to me or whether I paid for it—I know I own it.

X Q. 17. And you were willing that he should exercise his judg-

ment for this company in the matter of attending to its business, so far as you were concerned?

A. Yes, sir.

212 X Q. 18. He had attended to the business of the De La Vergne Refrigerating Machine Company from the inception of the company, had he not?

A. Yes, sir; usually as far as his duty was concerned.

X Q. 19. He was the leader in all things that were done by this company?

A. Yes, sir.

X Q. 20. He attended to the solicitation of contracts of the company?

A. No, sir; he had the final decision in the matters of the company though—but he couldn't be in the West and East of course, the orders of Mr. Reummele who was the director out West were received by him and acted upon.

X Q. 21. Do you not recall that Mr. John C. De La Vergne explained to you when you objected to the making of this contract of the 1st of May, 1891, between the De La Vergne Refrigerating Machine Company and Mr. Joseph Koenigsberg, that he had made a contract on the 16th of April, prior thereto for the purchase of the assets of the Consolidated Ice Machine Company and that sixty days from the 25th of April he would be the owner or this company would be the owner of those assets?

A. No, sir.

X Q. 22. Do you mean to say that Mr. John C. De La Vergne, deceased, kept you entirely in ignorance of the making of any contract for the assets of the Consolidated Ice Machine Company?

A. I never knew of it until it was completed.

X Q. 23. Then you knew of it?

A. Yes, sir.

X Q. 24. From whom did you get your information?

A. From the paper shown here—the contract.

X Q. 25. Where is that contract now?

A. I don't know.

X Q. 26. It was put here with the papers of this company, was it not?

A. I don't know.

X Q. 27. Wasn't that paper or contract shown him immediately after his return from Chicago in April, 1891?

A. I couldn't say whether immediately afterwards or not.

X Q. 28. You couldn't say whether it was shown immediately or in the course of a month or more?

A. It might have been a month or two months.

X Q. 29. When you saw that paper did you make any objection to it?

A. I don't think I did object to it because it was executed, and an objection amounted to nothing.

X Q. 30. It was executed by John C. De La Vergne as president of the De La Vergne Refrigerating Machine Company?

A. I don't recall how it was signed; I remember looking at it and seeing it.

X Q. 31. You are sure it was the contract of April 16th, 1891, are you not?

A. I think it was.

X Q. 32. It was the contract for the purchase of the assets of the Consolidated Ice Machine Company, was it not?

213 A. I don't know whether it was assets, or stock, or what it was, I can't say now.

X Q. 33. Are you sure it was for the purchase of something of the Consolidated Ice Machine Company?

A. I think so, or of the stockholders—I do not recall it fully now.

X Q. 34. Did you see the certificates of stock of the Consolidated Ice Machine Company when they came here from St. Louis?

A. No, I never saw them.

X Q. 35. Did you know of their having come here?

A. I heard Mr. Baron state so.

X Q. 36. Who was the attorney in the city of New York of the De La Vergne Refrigerating Machine Company in the year 1891?

A. Ashbel P. Fitch.

X Q. 37. Was he engaged by the year on a stated salary, or by the case?

A. By the year I think.

X Q. 38. Who was employed, if any one, by this company to make an examination of the assets of the Consolidated Ice Machine Company, or its affairs?

A. I believe Mr. H. W. Guernsey was.

X Q. 39. Did he ever make a report of his work, or the results thereof to this company?

A. Yes, sir.

X Q. 40. Where is that report so made by him?

A. I don't know where it is now, unless he has it; I have seen it but I have not got it in my possession.

X Q. 41. Was that made in the month of February, March or April, 1891?

A. That I couldn't say, I don't remember dates.

X Q. 42. Will you search among the papers of this company and bring forth that report, if it still be among the records of the company?

A. I will try to do so, yes, sir.

X Q. 43. Who paid Mr. Guernsey for that work?

A. This company.

X Q. 44. And you hold his receipt for the amount paid him therefor?

A. I don't know whether he gave a receipt or not.

X Q. 45. What was the amount paid him for his work?

A. That I couldn't say.

X Q. 46. Was any one else employed by the De La Vergne Refrigerating Machine Company after you obtained knowledge of the making of the contract of April 16th, 1891, or rather of the contract

which was made in the name of the De La Vergne Refrigerating Machine Company for the purchase of certain things from the Consolidated Ice Machine Company, or its stockholders—was there any one employed by your company to approach the creditors of the Consolidated Ice Machine Company with propositions of purchase or compromise of the claims of that company?

A. I don't know what Mr. John R. Waters did, just what he did I don't recall now.

214 X Q. 47. He was employed in connection with that work, was he?

A. I supposed it was that work, I don't know what work he performed.

X Q. 48. But you did pay him for some work?

A. Yes, sir; I think it was in connection with this work.

X Q. 49. And your receipt will show the amount paid, and when it was paid, will it not?

A. I suppose it will.

X Q. 50. By whose directions did you make these payments to Messrs. Guernsey & Waters, if by any one's?

A. By Mr. John C. De La Vergne's.

X Q. 51. Did you make any objections to these outlays when you were called upon to make them for the company?

Defendant's counsel here stated that as to that question and all similar questions, not desiring to repeat his objection he would state generally that he objected to it on the ground that it was immaterial, irrelevant and incompetent, and on the further ground that the corporate power cannot be derived through estoppel, or a contract beyond the corporate powers be made valid by an estoppel *in pais*.

A. I made no objection to Mr. De La Vergne, but I thought the charges were rather exorbitant, and have so stated to our secretary and to Mr. De La Vergne.

X Q. 52. Who was your secretary at that time?

A. Mr. Charles H. Cone.

X Q. 53. Is he still the secretary of the company?

A. No, sir.

X Q. 54. Who is now secretary of the company?

A. Mr. John V. Rhodes.

X Q. 55. Was any other trustee conversant with the employment and payment of these gentlemen besides Mr. John C. De La Vergne and Mr. Cone?

A. I think Mr. Block must have been and Mr. Cone.

X Q. 56. Who was the fifth trustee at that time?

A. John G. Gillig.

X Q. 57. Where is John G. Gillig now?

A. John G. Gillig now is treasurer of the company, he is connected with it.

X Q. 58. Was he also conversant with what was done with reference to the employment and payment of these gentlemen?

A. I don't think he was.

X Q. 59. Was he employed in the concern in the year 1891?

A. No, sir, nothing more than trustee and stockholder.

— Q. 60. What was his occupation—Mr. Gillig's—in the year 1891?

A. He was also connected with Jacob Rupert's brewery, his agent when he was abroad.

215 X Q. 61. Is it the Mr. Jacob Rupert to whom you now refer—that is now connected with that company as president?

A. Yes, sir.

X Q. 62. And Mr. Gillig then was in the board of trustees at that time as the representative of Mr. Jacob Rupert, was he not?

A. No, sir; he represented himself.

X Q. 63. How many shares did he then hold in this company before the increase of its capital stock?

A. I couldn't say without looking at the books.

X Q. 64. Has Mr. Gillig paid for those shares himself?

A. I suppose he must have, for I don't know where he got them from; I see Mr. Rupert had eleven here.

X Q. 65. Did you attend to any of the correspondence for your company in the year 1891?

A. I suppose I must have written some letters.

X Q. 66. Did you write any letters to the assignee of the Consolidated Ice Machine Company after April 16th, 1891?

A. I do not recall now.

X Q. 67. Have you still your copies of the letters or the company's copies of the letters written in 1891?

A. Yes, the letter books.

X Q. 68. Those I suppose you will let me see?

A. Yes, sir.

Plaintiffs' counsel here stated that if there was anything referring to the so-called purchase of the assets of the Consolidated Ice Machine Company, or correspondence with the assignee after the purchase, asking for the condition of the assets, and directing what should be done with the pending claims—whether propositions of compromise should be accepted or declined he desired all that correspondence.

Defendant's counsel stated that if there was any such correspondence that he would request Mr. De La Vergne and the other officers of the company to produce it.

Defendant's counsel further stated that Mr. De La Vergne, the witness, presents contract No. 340 C in the account heretofore offered in evidence as No. New York Exhibit 5, which contract may be offered and marked New York Exhibit 6.

Also contract No. 336 C and a copy of the bond and additional contract, which three papers may be marked New York Exhibits 7, 7 A and 7 B.

Also contract marked No. 337 C in the said account which is here offered in evidence and marked as New York Exhibit 8 and 8 A—the latter being a copy of the bond upon which said contract was based.

Also contract No. 349 C, and referred to in said account, which contract was offered in evidence and marked as New York Exhibit 9, together with the bond and copy of the bond marked New York Exhibit 9 A and 9 B.

Witness says that the contract with the Philadelphia Packing and Provision Company, which is numbered 353 C is probably in the possession of the attorney of the De La Vergne Refrigerating Machine Company, who brought suit upon said contract and that he will telegraph for the same and introduce it if he receives it.

Witness also produces receipt of H. W. Guernsey, dated Feb. 4th, 1891, for services in investigating the affairs of the Consolidated Ice Machine Company and the outlays made, which is offered in evidence and marked New York Exhibit 10. Also receipt of John R. Waters dated October 1st, 1891, and payment receipt of October 27th, 1891, which is offered in evidence and marked New York Exhibit 11 of this date.

Witness produces copy of the by-laws of the defendant company, and article 4, section 1, defining the duties of the president are marked in evidence, New York Exhibit 12 of this date.

The letter-press copy books of the defendant company, covering the periods of 1890 and 1891 are also produced by the witness, and all the letters addressed to John R. Waters and Robert E. Jenkins, assignee, are marked and the books are tendered to the attorney for the plaintiff with the request that he signify what ones, if any, he desires to have introduced in evidence.

Plaintiffs' counsel asked that the witness attach to his deposition a copy of the section of the company's by-laws which refers to the duties of the treasurer.

Defendant's counsel ordered that the same be done.

X Q. 69. The books of your company showing the outlays for bills presented by Mr. John R. Waters for services rendered to the De La Vergne Refrigerating Machine Company in the matter of the Consolidated Ice Machine Company, insolvent, were subject to the inspection of your stockholders and trustees at all times, were they not?

A. Yes, sir.

X Q. 70. And that also applies to the payment of the bill of H. W. Guernsey for services in examining into the assets of the Consolidated Ice Machine Company, insolvent, in the year 1891, does it not?

A. Yes.

X Q. 71. And no objection was made to those outlays excepting that it was urged that the amount was larger than it should have been in the case of Mr. Guernsey, is not that correct?

A. I don't know of anybody raising any objection except myself. I don't think they knew anything about it. I know I only told Mr. Cone about it.

217 X Q. 72. He consented that the same might be paid, didn't he?

A. I don't know what he consented to; it was paid, I know,

whether he gave his consent to it, is a matter that I don't know about.

X Q. 73. You would not have objected to the same if you had not deemed it a liability of this company, would you?

A. I never gave it any thought—that is, I suppose I never thought about it.

X Q. 74. The matter was never brought to the attention of the board of trustees while in session by any one, was it—excepting as the board had the opportunity to inspect your outlays for the account of the company—by inspection of the books thereof?

A. They had the opportunity.

X Q. 75. No concealment of these payments was made in any of the books of the company?

A. No, sir.

X Q. 76. You made the payment of the State tax which authorizes you to issue the increased stock of the company, on the 22nd or 23rd of May, 1891, did you not?

A. I can't recall the date, I do not know.

(This was admitted by counsel for the defendant company.)

X Q. 77. Did you make any effort to sell this increased stock?

A. No, sir.

X Q. 78. Now part of this stock was issued to the old stockholders under a declaration of a dividend made by the company's board of trustees on May 13th, 1891, was it not?

A. I don't know as to the date.

Counsel hands book to witness.

The WITNESS: I see the resolution is here under date of May 13th, 1891; a dividend of 300 % is declared.

X Q. 79. About how much of the stock remained unissued at the end of the year 1891?

DEFENDANT'S COUNSEL: I would suggest that this subject can be better proved in connection with the testimony of Mr. Cone from the stock register.

A. I cannot say, as I have not these figures in my head.

X Q. 80. Were any of the negotiations for foreign or domestic syndicates who desired to purchase the assets of your company brought before the board of trustees while sitting as a board?

A. I think they were, yet I cannot state positively; I know it was talked about, but whether before the board as a board sitting, or after they adjourned, or how, all I know is, it was spoken about.

X Q. 81. Can you point out any meeting of the board of trustees or of the stockholders of your company at which any proposition of the syndicate for the purchase of the assets of your company were submitted, or acted upon in any way?

A. I cannot.

X Q. 82. All propositions looking to the purchase of the assets of the company were considered and the negotiations had with your

company by the president of the company, were they not all more or less under his direction, so far as you know?

A. I think some one else besides Mr. De La Vergne tried to get the consent of the stockholders, but I don't know who it was though.

X Q. 83. No one was authorized to further or aid in such negotiations by your board of trustees, so far as you know, in any meeting of the board?

A. No, sir, not as I know.

X Q. 84. Were not all these negotiations ended in the year 1890?

A. I couldn't give the date, I don't know.

X Q. 85. Was not one of the objects of the increase of the capital stock of your company, to issue to the stockholders of the Consolidated Ice Machine Company stock or to enable them to take the stock for its assets and good will?

A. No, sir.

X Q. 86. Why was Mr. Waters endeavoring to make arrangements for the purchase of the claims of the Consolidated Ice Machine Company, if it was not your purpose to issue stock—increase capital stock to the stockholders of the Consolidated Ice Machine Company, insolvent?

A. One reason was—I heard stated—that they would like to do away with the competitor; another reason was, there might possibly be some money made by it.

X Q. 87. Such money could only have been made however by either issuing \$100,000 of stock to the stockholders of the Consolidated Ice Machine Company, or paying \$100,000 for the assets that were conveyed by the contract of April 16th, 1891—is not such the fact?

Counsel for the defendant objected to the question on the ground that it is immaterial, irrelevant and incompetent; also on the further ground that it was calling for the witness' legal opinion.

A. I am not familiar enough to state the fact; I heard a conversation at which the idea was, that provisions would be made to make the payment in money.

X Q. 88. Have you learned what has become of the fifth contract made by Mr. Koenigsberg for the erection of a plant for the Consolidated Ice Machine Company—the pattern of the machine—since you were on the stand yesterday?

A. I have not been able to find it.

X Q. 89. That contract in substance was like these other four contracts that have been offered in evidence, and the same was also assigned to the De La Vergne Refrigerating Machine Company immediately after the same were obtained by Mr. Koenigsberg, was it not?

A. There is only three of those that way, as I understand it; the fourth one is on our blanks—there are only the first three that way.

X Q. 90. Then the only difference there was is in the amount and name of the party with whom the contract was made?

A. Yes.

X Q. 91. But in all other respects this contract that cannot be found is like the three other contracts before offered in evidence?

A. Yes, sir.

X Q. 92. And this also was duly assigned to the De La Vergne Refrigerating Machine Company on the back of it immediately after the contract was obtained?

A. Yes.

X Q. 93. Were you familiar with the manner of the keeping of accounts for these four or five contracts in the books of your company?

A. Not enough familiar to explain it.

X Q. 94. Who has particular charge of your books and the manner of keeping them?

A. The secretary of the company, Mr. Charles H. Cone.

It is hereby stipulated and agreed by counsel that the signatures of the witnesses to their respective depositions are waived.

Redirect by Mr. ALDRICH:

R. D. Q. 1. State whether any orders were given or any action taken by any officer or agent of the defendant company to depreciate the assets of the Consolidated Ice Machine Company or to prevent the assignee from collecting the full amounts due him as the successor of that company.

A. I don't know or remember of any such action.

R. D. Q. 2. I will ask you as to whether any action of that kind was taken by any employee or officer of the company.

A. I don't know of any.

Form of letter sent to wealthy men and brewers for the purpose of selling the treasury stock of the defendant company after its increase of capital is produced—the same being a letter addressed to John H. Vanderhorst, Baltimore, Maryland, dated July 10th, 1891, offered in evidence and marked New York Exhibit 26.

Signature waived.

LOUIS BARON, a witness called on behalf of the defendant company, being duly sworn, testified as follows:

By Mr. ALDRICH:

Q. 1. What is your name, residence and occupation?

A. Louis Baron, 320 E. 78th St., New York city; assistant to the general manager of the De La Vergne Refrigerating Machine Company.

220 Q. 2. How long have you been connected with the defendant company?

A. About twelve years.

Q. 3. What relations, if any, did you sustain to the company or its president in the years 1890 and 1891?

A. I was secretary to the president of the company—his assistant for the company.

Q. 4. As such, did you have knowledge of the proceedings of the stockholders and directors of this company?

A. To some extent.

Q. 5. Did you have access to the board of trustees and stockholders?

A. Yes; if I wanted to.

Q. 6. I believe you acted as secretary *pro tem.*, did you not?

A. Yes; up to January 1st, 1890, and prior to that time.

Q. 7. State, Mr. Baron, what if any, action the stockholders of this company ever took with reference to the purchase of the assets of the Consolidated Ice Machine Company, or of the stock of certain stockholders of that company.

A. None to my knowledge.

Q. 8. I ask you the same question with reference to any action of the board of trustees or directors, as they are called.

A. None to my knowledge.

Q. 9. State what property or other thing of value of any description whatsoever ever came to the defendant company through or by virtue of the contract of April 16th, 1891.

A. I never knew of anything of value coming to them.

Q. 10. You were, as I understand it, private secretary to Mr. John C. De La Vergne?

A. Yes; private and public too; I was his secretary.

Q. 11. What knowledge did you have about Mr. Guernsey's being sent out by Mr. De La Vergne to investigate the Consolidated Ice Machine Company's assets?

A. I know that he had been sent there for that purpose, and that he had gone out there and attended to these matters, that is all I knew.

Q. 12. What knowledge did you have about Mr. Waters being sent out there?

A. I knew that fact of his having been sent out there.

Q. 13. By whom?

A. By Mr. John C. De La Vergne.

Q. 14. Without desiring to lead you, Mr. Witness, I will ask you if Mr. Waters was sent out there to investigate the assets and make an attempt to buy the claims of certain creditors.

A. To buy the claims of certain creditors; yes; but not to investigate the assets. To find out how much he could get (*for them*).

Q. 15. Did you have anything to do with the stock of certain stockholders of the Consolidated Ice Machine Company that was delivered to Mr. De La Vergne through Mr. Koenigsberg?

A. Yes, sir.

221 Q. 16. Have you any memoranda or other papers that would enable you to state at what time this was done?

A. Yes.

Q. 17. When was it?

A. I think it was early in the year 1891—I would have to refer

to my memoranda (witness looks at memoranda) it was the 25th of April, 1891.

Q. 18. To whom was that delivery made?

A. To Mr. John C. De La Vergne.

Q. 19. What was done upon the receipt of that stock?

A. Mr. De La Vergne handed the certificate to me, after he had received them from Mr. Koenigsberg's hands, and signed the receipt for them—then he gave them to me to look through them, and check them off to see if they were all right. This I did, making a written memoranda of each certificate and also some notes concerning them.

Q. 20. Have you the memoranda?

A. Yes, sir.

Q. 21. Please produce it.

(Witness produces it.)

Memoranda offered in evidence and marked New York Exhibit 13 of this date.

Q. 22. Did you call Mr. De La Vergne's attention to any objection?

A. I did.

Q. 23. To what?

A. I called his attention to the fact that certificate No. 15 was indorsed in blank. Further, that certificate No. 17 was transferred and assigned "to John C. De La Vergne by direction of the German Savings Institution, the owner hereof," but that the transfer was signed by the executors of Jungenfeld estate. I at that time asked Mr. De La Vergne how the executors could transfer this certificate, when it appeared on the face thereof that the German Savings Institution were the owners of it.

Q. 24. To whom were the other certificates indorsed—John C. De La Vergne, or the De La Vergne Refrigerating Machine Company?

A. I don't recollect at this moment.

Q. 25. Have you copies of them?

A. Yes, I can refer to the memorandas. They were all indorsed to John C. De La Vergne, except the one I called attention to as being indorsed in blank.

Q. 26. I infer from the memorandum which you have produced that this was the original certificate of the several owners and indorsed on the back and not a new certificate issued to Mr. De La Vergne.

A. No, sir; it was not a new certificate, it was an old certificate.

Q. 27. And there were no assignments outside of the blank form on the back?

222 A. None to my knowledge; no, sir; no separate assignments.

Q. 28. What was done with these certificates at that time?

A. Mr. De La Vergne and I went from his house to the best of my recollection on that very morning to Mr. Fitch's house, our attorney, and Mr. De La Vergne had him go through the certificates

to see if they were properly transferred, etc., that is all I know about it.

Q. 29. As I understand, he wrote a letter with reference to these assignments, did he not?

A. Yes, to the western parties calling attention to certain defects in the manner of its transfer.

Q. 30. What was done with the certificates thereafter?

A. They were brought here and put in the safe in his office.

Q. 31. In whose safe?

A. In Mr. De La Vergne's safe.

Q. 32. Have they remained there ever since?

A. No, sir.

Q. 33. When were they taken therefrom?

A. The 29th of September, 1893.

Q. 34. What was done with them then?

A. They were sent to Mr. Charles Nagel of St. Louis, Missouri.

The examination was here adjourned to Nov. 11th at 10 a. m.

NEW YORK CITY, *November 11th*, 1896.

The examination was continued.

LOUIS BARON recalled.

By Mr. ALDRICH :

Q. 35. Where was Mr. Fitch during the summer of 1891?

A. At Fire island, as I remember it.

Q. 36. State whether he was able to attend to business.

A. He was not.

Q. 37. What was the matter?

A. I know he was very seriously sick.

Q. 38. I want the facts only—he was sick, you say?

A. Yes, very sick.

Q. 39. Do you know when he was taken sick?

A. I don't remember.

Q. 40. Do you know whether it was soon after this matter?

A. Yes, it was shortly after he had written his letter to the West about the certificates.

Q. 41. You may state, if you know, how long the proposition to increase the capital stock of this company had been under consideration.

A. I remember its being talked about as early as the latter part of 1890.

Q. 42. Was that on the occasion of the proposed sale to an English syndicate?

A. Yes.

Q. 43. Something has been said about an effort on the part of the officers and employees of this company to depreciate the value of the Consolidated Ice Machine Company's property and of preventing the assignee of that company from collecting the amounts justly due him from persons or corporations owing

money to them prior to its failure on account of the uncompleted contracts—what do you know about it, if anything?

A. I know nothing of anything having been done like that.

Q. 44. You may state if anything had been done whether you would have known it?

Plaintiffs' counsel objected to the question on the ground that it is incompetent, irrelevant and immaterial and also on the further ground that it *was* leading.

A. I believe I would.

Q. 45. You may state whether or not any such purpose was entertained, or action taken by Mr. De La Vergne.

Same objection.

A. No, sir.

Q. 46. Or by any of the officers of the company employed by them?

A. No, sir.

Q. 47. Something has been said in the taking of this testimony about some relations had with Mr. Koenigsberg, were you conversant with those relations?

A. Yes, sir.

Q. 48. What if anything do you know about Mr. Koenigsberg's having certain contracts with the Featherstones with reference to the purchase by him of certain machines?

A. That I only know of in a general way—that he did purchase certain machines from them, which were used some for the plants for which contracts have been put in evidence.

Q. 49. State whether or not this company ever advertised, or held itself out as the successor of the Consolidated Ice Machine Company in any way?

A. No, sir.

Q. 50. State whether or not it ever built any Consolidated machines?

A. No, sir.

Q. 51. I ask you whether the company ever received any property on account of this April 16th contract?

A. It never received anything of value to my knowledge.

Q. 52. State whether or not John C. De La Vergne, or any other person ever received anything on account and for this company the Consolidated Ice Machine Company?

A. Nothing to my knowledge.

Q. 53. You may state what, if any steps Mr. De La Vergne took to have transfers of that stock put on the books of the Consolidated Ice Machine Company?

A. Nothing further than what I have already testified in regard to there having been defects in the transfer of the certificates—to have them rectified.

224 Q. 54. You have been requested to produce the letters of this company to Mr. Robert E. Jenkins and Mr. Waters, and

also the letters from Mr. Jenkins and Mr. Waters—have you made a search for those letters?

A. I have made a search for the letters from Mr. Jenkins, that is all I have done so far.

Q. 55. State whether or not you found any letters from Mr. Jenkins to this company?

A. No, sir.

Q. 56. And all the letters, as I understand you are addressed by Mr. Jenkins to Mr. John C. De La Vergne personally?

A. Yes.

Q. 57. Did you ever find any letters written by this company to Mr. Jenkins or any other person with reference to the Consolidated Ice Machine Company matter?

A. I have not looked to see whether there were any or not. Somebody else has done that perhaps. (Witness looks at the books.) Yes, sir; I have found letters by this company to Robert E. Jenkins.

Q. 58. Relating to what matter?

A. (Witness looks at book.) About his accounts with the De La Vergne Company—about the matter of the infringement of the Boyle patent; about the contracts which we were to finish up, a telegram by the creditors of the Consolidated Ice Machine Company, etc.—the above is substantially what the letters relate to.

Q. 59. Give the telegram in full to save any misapprehension?

A. (Witness looks at the telegram and reads it in evidence as follows:)

“APRIL 20TH, 1891.

“Please send as soon as possible promised copies of the correspondence, also a detailed list of the creditors with the amounts due them and their addresses.”

(Signed)

JOHN C. DE LA VERGNE.

Q. 60. To whom is it addressed?

A. Robert E. Jenkins, 89 East Madison St., Chicago, Illinois.

Q. 61. You stated that they related to his account with the assignee, what do you mean by that?

A. To the company's account—the De La Vergne Refrigerating Machine Company's account with the assignee.

Q. 62. For what was that?

A. For work which we did for him on various plants.

Q. 63. For the assignee?

A. Yes, sir.

Q. 64. I desire to know whether any correspondence, appearing in the books of the company, had any relation to the purchase by this company of the assets of the Consolidated Ice Machine Company?

225 Plaintiffs' counsel objected to the testimony as being secondary evidence, on the ground that the books were the best evidence.

A. Never to my knowledge.

Counsel for the defendant company states with reference to the objection just taken by plaintiffs' counsel, that the books have been put before the counsel for the plaintiff, not only yesterday but also today and are still before him. That he is invited to make the fullest examination of them, and ascertain the accuracy of the statement of the witness, as it must obviously be undesirable and unnecessary to put numerous books all of which are indexed, wholly and entirely in evidence.

Cross examination.

By Mr. RASSIEUR :

X Q. 1. I do not fully understand your connection with the company Mr. Baron, during the year 1891—will you please state what it was ?

A. I was at that time Mr. De La Vergne's private and business secretary.

X Q. 2. Did you hold any office in connection with the company ?

A. No, sir.

X Q. 3. Who paid your salary for the services rendered the company ?

A. The De La Vergne Refrigerating Machine Company.

X Q. 4. So that you were private secretary of Mr. De La Vergne in the doing of his work as president of the company for the De La Vergne Refrigerating Machine Company ?

A. Not altogether, I also did his personal private work.

X Q. 5. But your services were paid for by the De La Vergne Refrigerating Machine Co. ?

A. Yes.

X Q. 6. You have exhibited to me volumes 27-31 inclusive of the letter-press copies of the letters that were sent out by this company, have you not ?

A. Yes, sir.

X Q. 7. You have exhibited none others to me have you ?

A. No, sir.

X Q. 8. Are there any other letter books or letter-press copies covering the same period of time and issued by this company or kept by them ?

A. Yes, sir ; there are agency books, telling of the business matters between us and our agencies in the different territories.

X Q. 9. Where are those books ?

A. They are in our possession.

X Q. 10. Have those facts been exhibited to me ?

A. No, sir.

226 X Q. 11. Are there any other books in the possession of the company that contain the correspondence of Mr. John C. De La Vergne on account of this company ?

A. No, sir ; not to my knowledge.

DEFENDANT'S COUNSEL : With the plaintiffs' permission I desire here to ask the witness whether the agency books referred to have in them anything pertaining to this matter ?

The WITNESS: No, sir.

DEFENDANT'S COUNSEL: You are at liberty and are requested to produce them for plaintiffs' counsel's inspection in order that he may verify your statement on this subject. I understand your answer to be that they relate only to your business between the company and its agents.

The WITNESS: Yes, sir; that is all.

By Mr. RASSIEUR:

X Q. 12. Please examine this letter, dated April 20th, 1891, and directed to R. E. Jenkins, Chicago, Illinois, and say by whom it is signed? (Paper handed to witness.)

A. John C. De La Vergne.

X Q. 13. Is there any copy of that letter on your books?

A. (Witness looks at the book.) There is no copy of that letter on the books of the company.

Letter offered in evidence and marked New York Exhibit 14 of this date.

X Q. 14. Please examine this letter which I hand you, also dated April 20th, and directed to R. E. Jenkins, and state whose signature is appended to that letter?

A. (Letter handed to witness.) John C. De La Vergne's.

X Q. 15. And on whose letter-head is that letter written?

A. The letter-head of the De La Vergne Refrigerating Machine Company.

Letter offered in evidence and marked New York Exhibit 15 of this date.

X Q. 16. The telegram referred to by you in your examination-in-chief, which is copied on page 691 of volume 28 of your letter book is the same one that is referred to in Exhibit 15, is it not?

A. Yes, sir.

X Q. 17. Please examine this telegram, directed to Mr. Jenkins, of Chicago, Illinois, and state whether there is any copy of the same in your letter book?

A. (Witness looks at the letter book.) No, sir; there is no such copy on the books of the company.

X Q. 18. This place at the foot of East 138th street, where the works of the De La Vergne Refrigerating Machine Company are situated is also called Port Morris, New York, is it not?

A. Yes, sir.

227 Telegram offered in evidence and marked New York Exhibit 16 of this date.

Defendant's counsel stated that they had no objections to offer except that as against the De La Vergne Refrigerating Machine Company, the same was immaterial, irrelevant and incompetent.

X Q. 19. Please examine this letter directed to Mr. Jenkins, dated April 28th, 1891, and state by whom it is signed?

A. (Witness looks at letter.) By Mr. John C. De La Vergne.

X Q. 20. Is there any other copy of that letter among your copies of letters preserved by this company?

A. No, sir, I have just looked under that date.

Letter offered in evidence and marked New York Exhibit 17 of this date.

Same objection by defendant's counsel.

X Q. 21. Was there any telegram sent to Mr. Jenkins on May 2nd, 1891, a copy of which is preserved in your letter book?

A. (Witness looks at letter book.) Not a telegram, but a letter.

X Q. 22. Please read that letter?

A.—

"Mr. R. E. Jenkins, Chicago, Ill.

"MY DEAR SIR: Yours of the 30th ultimo just at hand. Think it is best for you to come here next week. We have made considerable progress with the business, but would like to talk with you here.

"Yours very truly,

"(Signed)

JOHN C. DE LA VERGNE.

"Dated May 2nd, 1891."

X Q. 23. Did Mr. Jenkins come here pursuant to that letter?

A. I couldn't say whether he came here pursuant to that letter, but I know that he came here.

X Q. 24. With whom did he confer while here?

A. With Mr. John C. De La Vergne.

X Q. 25. Where?

A. At this office.

X Q. 26. Do you know what the subject-matter was of their conference?

A. I remember that one of the principal matters talked about was having Mr. De La Vergne assist him in straightening out the difficulties on a number of the plants.

X Q. 27. Of the Consolidated Ice Machine Company?

A. Yes, sir; but really I don't recollect it well enough to state positively about any other matters.

X Q. 28. Please examine this letter, directed to Mr. R. E. Jenkins and dated June 3rd, 1891, and state by whom it is signed?

A. (Witness looks at letter.) By John C. De La Vergne.

228 X Q. 29. Is that letter copied in your letter-press book?

A. Yes.

Letter offered in evidence and marked New York Exhibit 18 of this date.

Same objection by defendant's counsel.

X Q. 30. Please examine this telegram, directed to Mr. Jenkins, and dated July 21st, 1891, and state whether it is copied in your letter-press book?

A. (Witness looks at the books.) It is, yes, sir.

Letter offered in evidence and marked New York Exhibit 19 of this date.

Same objection by defendant's counsel.

X Q. 31. Please examine this letter now handed you dated July 22, 1891, and directed to Mr. Jenkins, and state whether it is copied in your letter book?

A. (Letter handed to witness.) Yes, it is signed by the De La Vergne Refrigerating Machine Company by Louis Baron, secretary.

X Q. 32. It is the letter that confirms the sending of the telegram covered by Exhibit No. 19, is it not?

A. Yes, sir.

Letter offered in evidence and marked New York Exhibit 20 of this date.

Same objection by defendant's counsel.

X Q. 33. Please examine these two letters, one directed to R. E. Jenkins, and dated October 12th, 1891, and the other a copy of a letter directed to Messrs. Banning, Banning & Payson, also dated October 12th, 1891, and state by whom the first is signed?

A. (Witness looks at letters.) John C. De La Vergne, president.

X Q. 34. Are there any copies of these two letters preserved in your books?

A. (Witness looks at books.) There is a copy of both letters.

Two letters offered in evidence, marked New York Exhibit 21.

Same objection by defendant's counsel.

X Q. 35. Please examine these letters which you have produced as letters written by Mr. Jenkins to Mr. De La Vergne found among the papers of this company—please hand them to the stenographer and have them marked as exhibits in this case.

A. These were found in Mr. De La Vergne's papers that I spoke to you about.

229 Letters offered in evidence and marked New York Exhibit 22 of this date.

Same objection by defendant's counsel.

X Q. 36. Please examine page 564 of volume 29 of your letter book and read that telegram in evidence.

Same objection by defendant's counsel.

A. (Witness reads:)

"JUNE 23RD, 1891.

"John R. Waters, Hotel Wellington, Chicago, Illinois:

"Your four telegrams received and being carefully considered by Fitch and myself. Do not leave Chicago until you hear from me again."

(Signed)

JOHN C. DE LA VERGNE.

X Q. 37. Where are the four telegrams referred to herein?

A. I do not know, but I think I can find them.

By Mr. ALDRICH: Are they in Mr. De La Vergne's private papers or among the papers of the company?

A. Among his private papers.

Same objection by defendant's counsel.

By Mr. RASSIEUR:

X Q. 38. Do I understand you to say that you decline to produce these telegrams referred to in the telegram of which a copy appears in the De La Vergne Refrigerating Machine Company's letter book, and in which telegram a consultation is suggested as necessary with the attorney of this company?

By Mr. ALDRICH: Before further answering counsel for the plaintiff, let me ask the witness do I understand you that Mr. Fitch was also Mr. De La Vergne's private attorney—was that the fact?

The WITNESS: Yes sir.

By Mr. ALDRICH: And Mr. Fitch is the present attorney of the estate?

The WITNESS: Yes.

DEFENDANT'S COUNSEL: Further answering counsel for the plaintiffs' question, I do not decline to produce the telegrams, but as they do not represent Mr. De La Vergne or his estate, I decline to request the witness to go to his private papers and take therefrom the telegrams or any other papers of his that are of a private nature. I do not think that I have any authority to do so in the premises.

Mr. ALDRICH:

Q. Have you any authority from the estate to produce such papers?

The WITNESS:

A. No, not any authority from the defendant.

230 DEFENDANT'S COUNSEL: I will say further to plaintiffs' counsel, that so far as the defendant company is concerned, we have no desire to suppress or withhold anything, and I desire to state that I will make a request of the estate to allow the production of these telegrams and papers. I think this is all that can be required of us, in view of the fact that there are the interests of minor heirs to be considered.

Mr. RASSIEUR:

X Q. 39. You know that Mr. Waters was in the employ of the De La Vergne Refrigerating Machine Company at the time when these telegrams were sent to Mr. De La Vergne, do you not?

DEF'T'S COUNSEL: Objected to on the ground that so far as I am concerned or advised, all the letters and correspondence and employment was between Mr. Waters and Mr. John C. De La Vergne personally, without any authority whatever from the board of trus-

tees of this company, although the board of trustees, by Mr. John C. De La Vergne's direction paid the cost of Mr. Waters' services.

PLAINTIFFS' COUNSEL: I prefer to take the witness' knowledge on that subject as being better and preferable than that of counsel.

DEFENDANT'S COUNSEL: But the facts stated are already developed in the evidence and therefore I submit that the evidence is immaterial, incompetent and irrelevant.

A. I don't know positively but that was my presumption.

X Q. 40. These telegrams are within your reach and under your personal control, are they not?

A. I believe them to be within my reach, although I can't positively say that I can find them; but that they are under the control of the estate of John C. De La Vergne, if they are where I think they are.

X Q. 41. Have they been left in your custody in this office, or in some one else's custody?

A. I usually had the custody of all these papers.

X Q. 42. There has been no change in the custody of these papers since the executors took charge of the estate, has there?

A. Yes there has, because a great many of the estate's papers were taken from this office by the executors, and I would not feel that I personally had any right—any authority to exhibit or give them to anybody without having power from the estate to do so.

X Q. 43. When were the other papers taken away from the company by the executors—or about when?

231 Defendant's counsel objected to the question as assuming a statement that the witness has not made—I do not understand that the papers have been taken away from the company.

A. About August, 1896—I may be two or three months out of the way.

X Q. 44. To the best of your recollection these papers that remained here were also known to the executors, or the fact that they were here was made known to the executors, was it not?

A. Only in a very general way.

X Q. 45. And they were left here by the executors thereafter and to the best of your recollection these telegrams were among the papers that remain?

A. Yes.

X Q. 46. Can you state from recollection what these telegrams were about?

A. I cannot.

X Q. 47. Please examine a copy of the letter appearing on page 581 of volume 29 of your letter book and read it.

A. (Witness looks at letter book.)

Same objection by defendant's counsel.

Witness reads copy of the telegram sent by Louis Baron from the Western Union office, 6th avenue between 46th and 47th Sts., as follows:

"JUNE 24TH, 1891.

"John R. Waters, Hotel Wellington, Chicago, Ill.:

"Mailed important letter to you which left on the 9 o'clock train last night. You should receive the Crane papers this morning.

"(Signed)

JOHN C. DE LA VERGNE."

X Q. 48. What papers are the papers referred to in that telegram as the Crane papers?

A. I don't recollect sir.

X Q. 49. Were they contracts which Mr. Waters was then engaged in making with the firm or corporation called Crane Brothers of Chicago at that time?

A. I could not say.

X Q. 50. Where is the copy of the letter referred to in that telegram?

A. (Witness looks at books.) The letter enclosing the Crane papers, dated June 22, 1891, is copied in a letter book of the company and is signed John C. De La Vergne, president. The important letter referred to in the telegram, I do not find copied in the company's letter books.

X Q. 51. Do you know any other place where a copy has been preserved of that important letter?

A. Probably in Mr. De La Vergne's private or personal letter book, but I could not say for sure of course.

X Q. 52. Where is that personal letter book?

A. Here in his private safe or vault among his private books.

232 X Q. 53. Is it subject to your control?

A. No, sir.

X Q. 54. Is it in your custody?

A. At present, yes.

X Q. 55. I ask you to produce the same.

DEFENDANT'S COUNSEL: What letter was this?

The WITNESS: Letter to Mr. John R. Waters.

DEFENDANT'S COUNSEL: For reasons heretofore stated the witness is instructed at the present time not to produce the book or paper.

X Q. 56. Was this book also shown to the executors at the time the executors took away certain property of the deceased John C. De La Vergne from this office?

A. No, sir.

X Q. 57. Or was it not turned over to the executors if you know?

A. They never asked to have it turned over to them. I had the custody of these books and all of Mr. De La Vergne's personal papers which he kept here. The only papers which the executors ordered to be taken away were certain deeds and mortgages and other valuable papers to be put in the safe-deposit vault. The executors never have gone through all the personal papers and books of Mr. De La Vergne up to this time, because I presume they had not found it necessary to do so.

X Q. 58. Did you see that letter and read it before it was mailed?

A. I can't say from positive recollection, but inasmuch as I usually took dictation of important letters personally, I have no doubt I did see it.

X Q. 59. Was it in relation to the Consolidated Ice Machine Company's matters?

Same objection as before by defendant's counsel.

A. I can't say without referring to a copy or the original.

X Q. 60. Please (*return*) to page 620 of volume 29 of your letter books and state what that letter is.

A. (Witness looks at the books.) It is a copy of a telegram apparently.

Same objection by defendant's counsel.

X Q. 61. Written by whom, to whom?

A. (Witness reads the same.)

"JUNE 29TH, 1891.

"John R. Waters, Wellington hotel, Chicago, Ill.:

"Mailed you a letter late Saturday night covering all I have to say about the Consolidated matters even since receiving your letter—quick-delivery letters. Also a letter this p. m. covering the Crane pipe matters.

"(Signed)

JOHN C. DE LA VERGNE."

233 X Q. 62. Where is the important letter regarding the Consolidated Ice Machine matters therein referred to?

A. (Witness looks at the books.) I don't know except that it may be copied in the personal book; it is not copied in the company's books.

X Q. 63. You also decline to furnish a copy of that letter, which, if copied in the private letter book of Mr. De La Vergne, you would know of?

A. I do, under instruction of counsel.

X Q. 64. Where are the quick-delivery letters referred to in that telegram, which were received by Mr. Waters?

A. I don't know.

X Q. 65. Have you ever looked for them?

A. I have; yes, sir.

X Q. 66. Did you ever look for them among the papers of Mr. De La Vergne?

A. Yes.

X Q. 67. And have not been able to find them?

A. I have not.

X Q. 68. Do you know what was in those letters?

A. I do not recollect; no, sir.

X Q. 69. Please look at page 71 of volume 30 of your letter-press books.

(Witness looks at books.)

Now before you speak of the same, I would like to ask you what connection had Mr. H. A. Banning with the De La Vergne Refrigerating Machine Company on July 22, 1891?

A. He was the patent attorney for the company.

X Q. 70. He had charge of all the matters in that line, in which your company needed the attention of a patent attorney?

A. Yes, sir.

X Q. 71. State what that copy of the letter is, which appears on page 71.

Same objection by defendant's counsel.

(Witness reads the same in evidence.)

" JULY 22ND, 1891.

" Mr. Joseph Koenigsberg, 213 E. 54th St., New York.

" DEAR SIR: I desire some information, if you can give it, as to the agreement between David Boyle and the Consolidated Ice Machine Company, which I understand was made some years ago, the effect of which was, I understand, to permit Boyle to build the Boyle machine up to the time of his death. Mr. Boyle died some three or four weeks ago in Mobile, Alabama, and we are informed that the business is being carried on by his widow, and they are going to continue the building of the machines. Please furnish me with all

the information that you can concerning Boyle's rights, as
234 we want to know whether it will be advisable for us to take steps to prevent the further building of those machines.

" Yours very truly, HUBERT A. BANNING."

Defendant's counsel moved to strike out the letter on the ground that it was immaterial, irrelevant and incompetent, and also that it had no relation to any issue in this case.

X Q. 72. You might also now turn to page 323 of that same volume 30 and state to whom that letter was written.

(Witness looks for the letter.)

Defendant's counsel objected to the question on the ground that it was immaterial, irrelevant and incompetent, and also that it had no relation to any of the issues in this case.

Please read the letter.

A. —.

" SEPTEMBER 15TH, 1891.

" Hon. Ashbel P. Fitch, Sharon Springs, New York.

" DEAR SIR: Enclosed please find a card of the Consolidated Ice Machine Company which Mr. Koenigsberg has just handed to me with the statement that he would like to avail himself of the matter upon this card, so far as may be possible, in issuing new cards in connection with his conduct of the business. I have suggested that the cut remain the same, and that 'The Consolidated Ice Machine Company' in type as it stands remain the same; that the words 'manufacturers of' be stricken out and that the names at the top of the card be taken out, or in lieu thereof the name of Joseph Koenigsberg in bold type and followed by the words 'formerly sec-

retary of' in small type be inserted. That the words 'branch offices' be erased, that the diamond design containing 'works and principal offices,' etc., be changed, so as to read something like this: 'Built under the Boyle patent now known by the name of the De La Vergne Refrigerating Machine Company.' I wish you would go over these suggestions, and state what, if any objections you have or see to changing the card in the manner suggested, and if you think that it can be improved, make such changes as you think advisable.

"In the circular which you have agreed upon, there is the sentence which reads as follows: 'Having severed my connection with the Consolidated Ice Machine Company, I have now arranged with the De La Vergne Refrigerating Machine Company,' etc. Mr. Koenigsberg wishes to insert after the words, 'The Consolidated Ice Machine Company' the words 'which made an assignment 235 on October 14, 1890,' and I have advised him that I see no objection to this change. It has gone to the printers in this form, but if objectionable advise us at once.

"Yours truly,

HUBERT A. BANNING."

X Q. 73. Have you or the company a copy of the original card, or of the card as amended, under the terms of this letter, in your possession, or in the possession of the company?

A. Not to my knowledge.

X Q. 74. You cannot then produce such a card as was published or issued under the terms of this letter?

A. No, sir.

X Q. 75. Did you observe the publication made by Mr. Koenigsberg in the *Brewers' Journal* by way of advertisement, under the contract entered into by Mr. Waters with the De La Vergne Refrigerating Machine Company?

A. I saw it first yesterday, that is the first time I saw it.

X Q. 76. You kept a copy of that *Journal* during the year 1891, did you not?

A. The company did, yes, sir.

X Q. 77. You may have seen the same without being able to recall that fact?

A. Yes, that may be so.

X Q. 78. I now hand you bills of John R. Waters for services and outlays in the matter of the Consolidated Ice Machine Company, insolvent, rendered to your company, the De La Vergne Refrigerating Machine Company, as of date July 1st, 1891, and which were produced by you—that bill was paid by your company, was it not?

A. I cannot testify of my own knowledge, I have not charge of the payment of the accounts—I presume it was though.

X Q. 79. Can you satisfy yourself as to whether that bill was paid from the books of the company—please do so if you can and state also as to this bill of the 26th of August of the same party to the same company in the same matter?

DEFENDANT'S COUNSEL: It is admitted on the record that the defendant company paid the bills referred to.

Letters marked in evidence New York Exhibits 23 and 24 of this date.

X Q. 80. The first of these statements of Mr. Waters covers services rendered as follows: Seventeen days in May and twenty-three days in June. Now up to the end of June, 1891, was he engaged in making contracts for this company for the building of Consolidated Ice Machine Company's machines by the firm of John Featherstone Sons of Chicago?

A. No contracts were made with them.

X Q. 81. Was that the business which he undertook to do at Chicago?

236 A. To the best of my recollection he had some negotiations with them looking to that end.

X Q. 82. What else was he to do in connection with the matters of the Consolidated Ice Machine Company, insolvent?

A. As I understood it he was to see the respective presidents of the companies and ascertain from them what their views were regarding the statement of their claims against the company.

X Q. 83. The second bill covers services in August and in July, 1891, extending up to the 26th day of August. Was he engaged in some kind of service during the period covered by the second bill?

A. I answer that both were intended to cover the services which I understood Mr. Waters was to render, but I do not recollect which of the periods he rendered the particular services in.

X Q. 84. Nor do you remember whether he rendered the same services covered by both bills?

A. No, sir.

X Q. 85. Now then, did you find at my request a statement of the expenses paid to Mr. John C. De La Vergne, the president of this company, for a period of time of which April 16th, 1891, was one of the days?

A. I found an expense ticket, dated April 24th for \$100, for expenses of Mr. De La Vergne on a trip to Chicago from April 8th to the 13th, but not for the 16th; although I have not completed my search.

X Q. 86. I wish you would complete your search and if you find no expense item for the period of time including the 16th ascertain and state whether the 13th on that expense bill dated the 24th is not an error and should have been the 23rd?

A. I will do so.

X Q. 87. Did you make out a copy of the account of Robert E. Jenkins, assignee of this company, during the period 1891?

A. I have the same made out (shows copy to plaintiffs' counsel).

X Q. 88. Does this cover the entire account of the assignee?

A. I cannot say without referring to the book-keeper.

(Witness goes to find out.)

Last question repeated.

A. Yes, sir.

Paper offered in evidence and marked New York Exhibit 25 of this date.

X Q. 89. What did you find about Mr. De La Vergne's expense account, regarding which I asked you a moment ago?

A. There is no account of expenses covering that period of time.

X Q. 90. What do you answer in reference to the error in that expense bill—as to that bill covering a period from April 8th to April 13th, when it should have read to April 23rd—the bill being rendered April 24th?

A. I find no evidence of any error in the ticket; it was a ticket made out in my own handwriting, and the fact that it was dated the 24th here by no means indicates an error because it was Mr. De La Vergne's custom very often to ask me to make out a ticket of this kind at a period much later than the time the actual expenses were incurred.

X Q. 91. When was the State tax for the increase of the capital stock of the De La Vergne Refrigerating Machine Company from \$350,000 to \$2,000,000, paid?

A. I could not say without investigating and finding out.

X Q. 92. Have you lately read the minutes of the meetings of the stockholders and the minutes of the meetings of the trustees of this company?

A. Part of them.

X Q. 93. Have you read the minutes of the meetings held in 1891?

A. Part of them.

X Q. 94. Do you know of any objection appearing in those minutes to any of the payments made to Mr. Waters or to Mr. Guernsey for services rendered in connection with the purchase of the assets from the Consolidated Ice Machine Company or its stockholders?

A. I do not.

X Q. 95. If such objections had been made at any of the meetings during the time that you held the office of trustee, would you recall those objections?

A. I never did hold the office of trustee.

X Q. 96. Well, then, during the time that you were connected with the company as private secretary?

A. I think I would—that is, if I heard of it; but of course I was not present always at the meetings of either the stockholders or the trustees and directors.

X Q. 97. Who ordinarily kept the minutes of these meetings?

A. At that time, Mr. Charles H. Cone, the secretary of the company.

X Q. 98. Have you any account in your books with John Featherstone Sons, a firm building machines at Chicago, Ill.?

A. That I can't answer without looking it up.

X Q. 99. I wish you would examine into the matter, and if such account exists, present a copy of it to me.

A. I will do so.

Redirect.

By Mr. ALDRICH :

R. D. Q. 1. Do you find from the minutes of the trustees of the defendant company that they ever directed the payment of any of these expenses?

A. No, sir.

R. D. Q. 2. You spoke of negotiations with the Featherstones to build Consolidated machines, was that under the Boyle patent or otherwise—what were those negotiations, explain in brief?

A. As I understood it they having had experience in building those machines, Mr. De La Vergne believed that if we sold cold-storage machines it might be better to have them do it, than do it ourselves—at least in the beginning; just as we used to do in the early history of our own business here—when we contracted with others for our machines, instead of building them ourselves. And further, if I remember correctly, it was believed that by giving them the contract at that time, it might in some manner have some influence in the matter of the settlement of their account with the Consolidated Company.

R. D. Q. 3. Do you find that this company ever had any correspondence with the Featherstones on that subject?

A. I cannot answer positively without looking the matter up; I am in doubt about it. No letter has ever been written by this company going as far back as November 21st, 1890—between the period November 21, 1890, and December, 1891.

R. D. Q. 4. I believe that Mr. De La Vergne was a man who had large personal interests himself, did he not?

A. Yes, sir.

R. D. Q. 5. And was in a venture outside of his interests in this company?

Objected to as immaterial, irrelevant and incompetent by plaintiffs' counsel.

A. He may have been.

R. D. Q. 6. You were his confidential man, his reference to those matters also, were you not?

Objected to by plaintiffs' counsel on the same grounds as before.

A. Yes, sir.

R. D. Q. 7. I believe you stated that you had examined the minutes of the board of trustees and also of the stockholders, and that you had found therein no mention of any proposed purchase of the assets of the Consolidated Ice Machine Company, or of any stock in that company?

A. I found no mention of those matters.

R. D. Q. 8. State whether or not your stockholders or directors ever did at any time take any action with reference to such purchase?

A. They did not.

R. D. R. 9. I will ask you to look up the matter about that Featherstone account and the payment of that fee to the estate—before I examine you further.

(Witness looks up the matter.)

A. I have found that the payment of the tax on the increase of the capital stock was made by a check of this company dated 239 May 23rd, 1891, to the order of Elliot Danforth, treasurer, New York State, for \$2,062.50. I find that the only account we had with John Featherstone Sons was an account against them beginning September 29th, 1892, and running along since then, for various small items we furnished on Consolidated machines in and about the city of New York.

Recross examination.

By Mr. RASSIEUR :

R. X Q. 1. To whom were the machines charged—the Consolidated ice machines that were built under these contracts made by Mr. Koenigsberg, while holding the contract of the De La Vergne Refrigerating Machine Company?

A. To Mr. Koenigsberg.

R. X Q. 2. Was that a correct charge in your books?

A. What do you mean?

R. X Q. 3. After Mr. Koenigsberg was employed by this company as its agent to procure contracts, was it correct to charge him, your agent, on your books with the cost of the machinery bought to comply with those contracts?

Defendant's counsel objected to the question on the ground that it is immaterial, irrelevant and incompetent, and also on the further ground as calling for the legal opinion of this witness.

A. We have never charged any machines to Joseph Koenigsberg. I thought you meant that the machines that were furnished to the various breweries under the contract with Mr. Koenigsberg—I thought you meant to whom they were charged by the parties who furnished them originally. We have no charges against Joseph Koenigsberg for these machines on our books that I know of.

R. X Q. 4. Now when John Featherstone Sons furnished machinery under the contracts in evidence—the contracts offered in evidence yesterday—to whom did you give credit on your books for such machinery?

A. That is a matter of record on the books; that I can't tell you without looking up the matter, for I do not keep the books. I can see now that probably my statement before was incorrect, or partially so.

(Witness looks the matter up.)

A. continued. So far as I can see, but only in a general way, credit for them was given to Joseph Koenigsberg, but as account-keeping and matters of that kind are not part of my duties, I do not feel fully competent to talk on that point.

R. X Q. 5. Do you know, or will you know by examination of the books, to whom credit was given for the machines furnished under those contracts to your company, or furnished to parties to whom these contracts were made on the credit of the company?

A. I will examine and find out.

(The witness having examined into the matter stated that his answer to this question would be the same as the one before.)

R. X Q. 6. Was there any correspondence between the president of your company and the firm of John Featherstone Sons, copies of which were kept in the letter-press book to which you have heretofore referred, as being in this office of your company, but as belonging to John C. De La Vergne?

A. That also I can only tell by reference to the book.

(Witness looks at the books.)

A. continued. I have looked through these books from February 24th, 1890, to March 20th, 1892, and find no letters to John Featherstone Sons.

R. X Q. 7. Will you kindly examine that book and state whether there is, or is not such correspondence in that book?

A. I will do so.

(Witness examines the book.)

R. X Q. 8. Will you determine if you can from the books of this company who paid for that letter-press book in which this so-called private correspondence is being kept?

A. I will do so.

R. X Q. 9. When were the negotiations ended with the London syndicate that at one time negotiated with the president of your company for the sale of your company?

A. There were negotiations with different syndicates at various times and to the best of my recollection, the last of them was had in the latter part of 1893.

Witness explains in regard to the previous questions as follows: I can say of my own knowledge that these books were always paid for by John C. De La Vergne personally, either by sending cash or check to the stationer's or by having the company do so and charging it to his account.

R. X Q. 10. When were the negotiations ended that began in 1890 or 1889?

A. Some time in 1890.

R. X Q. 11. They were ended before the beginning of the year 1891, were they not?

A. When I say they were ended some time in 1890, I refer to one specific negotiation which I have in mind, but I am not prepared to speak about it without further investigation; whether or not some other negotiations with a syndicate were taken up in the latter part of 1890, or during 1891, I cannot say positively.

R. X Q. 11. Have you any record in your minutes, or in the minutes of the company of its stockholders' meetings or directors' and trustees' meeting of these negotiations?

241 A. No, sir, not to the best of my recollection.

R. X Q. 12. Who was charged by the company or the board of trustees with the duty of negotiating with these foreign or domestic syndicates for the sale of the De La Vergne Refrigerating Machine Company?

A. As far as my knowledge goes, the board of trustees did not charge anybody with the duty of carrying on these negotiations at its meetings.

R. X Q. 13. The meeting that you have referred to in which the increase of the capital stock was voted upon by the stockholders of the De La Vergne Refrigerating Machine Company is the only meeting that the stockholders held in the year 1891, except the annual meeting held January 13th, 1891, at which the board of trustees was elected, is it not so?

A. (Witness looks at book.) Yes.

R. X Q. 14. Will you please attach to your deposition copies of all the meetings of the board of trustees of your company held in the year 1891?

A. I will.

Redirect.

By Mr. ALDRICH:

R. D. Q. 1. I understand from you that these books then were the private books of Mr. John C. De La Vergne?

A. Yes.

R. D. Q. 2. And they were kept for the purpose of containing his private business?

A. Yes, his private, personal business.

R. D. Q. 3. State whether or not the subject of the sale to any syndicates, foreign or domestic, was discussed by Mr. De La Vergne (by) the other trustees?

A. I think it was.

R. D. Q. 4. State whether or not, after this increase of the capital stock, or at about the time of the increase of the capital stock, you took any steps to dispose of such increase, and if so, what?

A. Yes, sir; Mr. De La Vergne, as president of the company, I remember, wrote a number of letters to people whom he believed might like to purchase stock in this company, especially some prominent breweries, in which he stated and informed them of the increase in the capital stock of the company, and that there was a certain amount in the treasury for sale.

R. D. Q. 5. And he attempted to sell and did sell this increased stock, didn't he?

A. He sold some of it.

R. D. Q. 6. And I understood you to say that was the purpose of the increase—to get additional capital?

A. Yes, to get additional capital.

Recross by Mr. RASSIEUR :

R. X Q. 1. Where are those letters kept that the president of the company wrote to prominent breweries?

242 A. We have the greater portion of the copies of those letters; I don't think the letters themselves were copied in the letter-press books.

R. X Q. 2. Was not at least one kept in the so-called private book of Mr. De La Vergne?

A. I don't believe so, I can only tell by investigation.

R. X Q. 3. They have not been copied in these books that have been exhibited to me, have they?

A. No, sir.

R. X Q. 4. Now how much of the stock—of the increased stock remains in the treasury that has not been sold?

A. None; I could not testify accurately as to that, but I think Mr. Cone, the secretary, can do so.

R. X Q. 5. How much remained in the treasury at the end of the year 1891?

A. I can only say from recollection, I think about \$600,000, but this would have to be verified.

R. X Q. 6. The old stockholders were voted a dividend of 300% on the assets of the company before the increase took place, were they not?

A. That I could not say without looking the matter up—the secretary, Mr. Cone, probably can tell.

Signature waived.

THURSDAY, November 12th, 1896.

RASSIEUR
vs.
THE DE LA VERGNE CO. }

Met pursuant to adjournment.

CHARLES H. CONE, a witness called for defendant company, being duly sworn, testified as follows:

Direct examination.

By Mr. ALDRICH:

1 —. You may state your name, residence and occupation.

A. Charles H. Cone; my residence is 1187 Washington avenue, New York city; I am employed as office manager of the De La Vergne Refrigerating Company.

2 Q. How long have you been connected with the defendant company?

A. Since January 1st, 1886.

3 Q. You may give briefly in detail your various relations to the company from that time to the present.

A. I came into the employ of the company on the 1st of January, 1886, as its book-keeper. I continued in that position until Jan-

uary, 1890, when I was made secretary of the company. I continued as secretary of the company until last month—October, 1896.

4 Q. Who was secretary and treasurer of the company in '90 and '91?

A. I was the secretary, and Mr. Louis De La Vergne was the treasurer.

243 5 Q. This action is brought on a contract dated April 16th,

1891, and in which the De La Vergne Refrigerating Machine Company by its president John C. De La Vergne, and Mr. John C. De La Vergne are parties of the third and fourth part, the first and second parties to said contract being certain stockholders in a company known as the Consolidated Ice Machine Company, and the Consolidated Ice Machine Company itself. I wish you to state, Mr. Cone, whether or not the De La Vergne Refrigerating Machine Company ever held any meeting either of its stockholders or directors for the purpose of considering the advisability of entering into said contract, or authorizing anybody so to do, or making the arrangement provided for in said contract?

A. There never was any such meeting.

6 Q. State whether such matter was ever taken up or discussed, or any action taken upon it, or with reference thereto, at any meeting of the board of trustees of the defendant corporation, and if so, what that action was?

A. There never was any such matter taken up at any meeting of the board of trustees.

7 Q. I will ask you to state, Mr. Cone, whether you are familiar with the records of the stockholders and board of trustees of the defendant corporation?

A. Yes sir; I am familiar with them—I wrote the minutes myself.

8 Q. State whether or not they are a true record of the action of the stockholders and directors, or board of trustees, of this corporation?

A. They are a true record.

9 Q. Whether they embrace all of the proceedings at such meetings and action taken, or not?

A. Embrace all of the business that was done by the meetings.

10 Q. I will ask you further whether they embrace all the meetings that have been held?

A. All of the meetings that have been held.

11 Q. You may state, Mr. Cone, whether or not the defendant company ever received any stock, property, assets of any kind or description whatsoever, including herein good will and business through or by virtue of the contract to which I have referred; and, if so, what it received?

A. Nothing was ever received to my knowledge.

12 Q. Something has been said about a purported delivery to this company of certain stock in the Consolidated Ice Machine Company. I will ask you particularly whether any such stock was ever received by this company?

A. Not to my knowledge; I never saw any certificates of such stock.

244 13 Q. If stock had been received for or on account of this company, I will ask you whether or not they would, in the ordinary conduct of the business, have come into your possession and to your knowledge?

A. Yes, sir.

14 Q. Mr. Witness, you may state, if you know, when it was first decided to increase the capital stock of this company from \$350,000 to \$2,000,000?

A. Well, I think it was in '91, but the record will show, the minutes of the meeting will show when it was decided; the stockholders' meeting was held at that time—

15 Q. Please state what, if any, relation such proposed increase of capital stock had to a proposed purchase by this company of the assets or good will or stock in the Consolidated Ice Machine Company?

A. Had no relation to it whatever.

16 Q. You may state what was the occasion of such increase?

A. The books of the company at that time showed a large surplus, and it was proposed to increase the capital stock, and divide the surplus among the stockholders.

17 Q. State whether there was any proposition also to raise additional funds for the business of the corporation?

A. It was partially—the intention in increasing the capital stock was to provide a sufficient working capital for the increased business which we had at that time.

The witness states that he has examined the record book of the corporation, and finds that the date of the increase of capital stock was February 4th, 1891.

18 Q. Some testimony has been elicited here with reference to the payment by this company for the examination of the assets of the Consolidated Ice Machine Company, made by Mr. Guernsey and also by Mr. John R. Waters. You may state how these payments came to be made—by whose direction?

A. Payments were made by direction of Mr. John C. De La Vergne, president.

19 Q. Was there any question with reference to these payments ever discussed, or the attention of the board of trustees ever called to these payments?

A. The attention of the board of trustees was never called to these payments. The payments were discussed.

20 Q. You may state, Mr. Witness, whether or not this board of trustees of this corporation, ever decided that it was necessary to the business of the De La Vergne Refrigerating Machine Company to purchase the assets or acquire the control of the stock of the Consolidated Ice Machine Company, or any action to that effect or purport?

A. Never was.

245 21 Q. I understood you to say that the subject was never discussed, or any action taken?

A. The board of trustees never discussed it or never took any action regarding it.

22 Q. Something has been said in the testimony with reference to an effort on the part of the officers or employes of this company to depreciate the value of the assets of the Consolidated Ice Machine Company, and to prevent the assignee, Mr. Robert E. Jenkins, from collecting from persons and corporations indebted to that company on account of plants erected by said company, the full contract price. I desire you to state whether or not any such action was ever taken by this company, or any officer or employe?

A. Not to my knowledge, no, sir.

Cross-examination.

By Judge RASSIEUR:

1 Q. Who were the members of the board of trustees in 1891?

A. John C. De La Vergne, Louis E. De La Vergne, John G. Gillig, Lewis Block and myself, Charles Cone.

2 Q. The business of the company was managed in the main by Mr. John C. De La Vergne, the president of the company, was it not?

A. The business of the company was managed in the name of the De La Vergne Refrigerating Machine Company.

3 Q. In the main, not in the name?

A. Why, I think the business was managed in the main in the name of the De La Vergne Refrigerating Machine Company.

4 Q. I did not ask you in what name it was managed, but who was the controlling spirit in the business of the De La Vergne Refrigerating Machine Company?

A. John C. De La Vergne, president.

5 Q. What amount of stock did he hold in the company before the increase was voted upon and divided among the stockholders in part?

A. I think he owned from 70 to 75 per cent.—maybe a little more.

6 Q. He owned that amount of stock in the old capital stock of \$350,000, and he held a similar proportion of the stock after the increase was voted, did he not?

A. Yes, sir.

7 Q. The contracts taken by the company for the erecting of refrigerating machines and plants, and ice-making plants and machines, were never submitted to the board of trustees, were they?

A. No, sir.

8 Q. These were approved by Mr. John C. De La Vergne, president of the company, were they not?

A. Yes, sir.

246 9 Q. In the employment of general agents of the company, Mr. De La Vergne, the president of the company, acted without submitting them for approval to the board of trustees?

A. When you say general agents, sir, do you mean all employees?

10 Q. By the term "general agents" I mean those who were en-

gaged in soliciting contracts, and those who held a position of representing this company to the outside world, like Mr. Rumley in the West, Mr. Rouremann in Cincinnati, and others elsewhere.

A. They were appointed by Mr. De La Vergne, as president, under his power, under our by-laws, which give him the power to appoint all employees of the company.

11 Q. Were these appointments ever submitted to your board of trustees for approval?

A. No, sir.

12 Q. He then had the full power of employing agents to attend to the business of this company?

A. Yes, sir.

13 Q. How much stock did you hold in the company as originally incorporated?

A. One share.

14 Q. From whom did you receive that share?

A. Mr. John C. De La Vergne.

15 Q. Did you pay him for it?

A. No, I never paid for it, except in services.

16 Q. You received pay that was agreed upon between you and him for the company?

A. Yes, sir.

17 Q. Besides this one share of stock?

A. Yes, sir.

18 Q. Mr. Block held how much stock in this company?

A. In the old capitalization one share at that time.

19 Q. Did he receive his share in the same way in which you received your share?

A. Yes, sir.

20 Q. Mr. Louis E. De La Vergne held how much stock in the old capitalization? You may look at the book if you desire to do so.

A. If you will let me, I do not remember it. (Witness examines book.) One share.

21 Q. Did he receive his one share in the same way that you did?

A. I do not remember that now; whether he paid his brother for it afterwards, or how it was, I do not remember. He may have received it in the same way we received ours.

22 Q. Mr. John C. De La Vergne was then the controlling spirit in this company, was he not?

A. Yes, sir, he was.

23 Q. He conferred with you as an individual, did he not, in the matter of the purchasing of the assets of the Consolidated Ice Machine Company?

A. Well, informally, yes, sir. Generally conferred with me—in a general way.

24 Q. He, in the discussion of that matter, in a general way, indicated to you that this company, the De La Vergne Company, would be benefited by such an arrangement, if it could be brought about as he thought it could have been brought about, did he not?

A. He thought it would be a benefit to the De La Vergne Com-

pany to purchase the assets of the Consolidated Company, provided they could be bought cheap enough.

25 Q. Did he intimate to you what would be, in his judgment, a cheap price for those assets, subject to the liabilities of the company?

A. I do not remember that he ever named a figure.

26 Q. Did you make any objection when he discussed the matter with you as to the propriety of taking such action?

A. I do not remember that I made any comment on it at all, for the conversation was so general I did not understand the particulars, so as to form a judgment about it.

27 Q. Was it also discussed in that general way with Mr. Louis E. De La Vergne?

A. I do not know, sir.

28 Q. Was it also discussed in that general way with Mr. Block, one of the trustees?

A. Not to my knowledge; it may have been.

29 Q. Did you ever hear any one of the trustees make any objection to the doing of what was done in the signing of this contract of the 16th day of April, 1891?

A. I know that the knowledge of that contract did not come to me until a long time after it was made.

30 Q. I am not asking you when the knowledge came to you; but I am asking you whether you heard any objection to the making of such a contract by the De La Vergne Refrigerating Company, prior to the 16th day of April, 1891?

A. Never heard any of the trustees discuss it at all.

31 Q. Then you also heard no objection made to the same as far as you recollect that matter now?

A. There was no objection, because there was no discussion upon it.

32 Q. Are you sure, Mr. Cone, that there was no discussion of that matter by the trustees of the De La Vergne Refrigerating Company prior to April 16th, 1891?

A. There was not in any trustees' meeting, but they may have discussed it individually among themselves. I could not tell you. I did not discuss it.

33 Q. Then the information which came to you prior to April 16th, 1891, with reference to making such a contract, was received by you without your entering into a discussion of the same, or the remarks of the same?

Mr. ALDRICH: Objected to because the question assumes something not testified to. I do not understand the witness to
248 have stated any information came to him before April 16th, 1891, and not a fair cross-examining question for that reason.

A. Now, of my knowledge, I never knew anything about that contract prior to this date; never knew there was such a contract in existence. I do not know what the other trustees knew, but I never knew it, and I am pretty certain that Louis De La Vergne

never knew it. I cannot swear to that. I can swear I never knew there was any such contract prior to this date.

34 Q. What I desire to again call your attention to is the matter referred to by you, in your examination, that was communicated to you by Mr. De La Vergne, regarding the propriety or desirability of the purchase of the assets of the Consolidated Ice Machine Company. When that matter was communicated to you individually in this office, did you indulge in any discussion regarding the same?

A. No, sir.

35 Q. You took it for granted that if Mr. De La Vergne deemed it advisable, that he had both the knowledge of the business and the capacity to take care of that matter for the De La Vergne Refrigerating Machine Company, did you not?

A. No, sir.

36 Q. You did not, then, believe that Mr. De La Vergne who had given to you your stock in this company, and who held about 75 per cent. of the stock of this company was able to take care of the interests of this company in a matter of this sort?

A. He was able to take care of it, but the formality was it should go through the board of trustees, because the board of trustees were his advisers that he picked out himself, and we were to assist him in managing the business, and deciding all such questions as contracts of that character—any outside business. Now, he should have submitted this matter to us in the formal meeting, or, at least, presented it to us all in such a way that in private discussion we all understood it; otherwise, we could not form an opinion about it, or give him any advice. That was never done.

37 Q. The objection that you make to his action then, is that he did not formally submit it in a meeting of the board of trustees?

A. Well, I do not know that I have made any objection to his action, excepting that would be the natural course for him to pursue if he had a piece of business of that character on hand.

38 Q. When he submitted the matter to you, or informed you of his intention or desire to purchase the assets of the Consolidated Ice Machine Company, you did not consider that submission such a submission as should have been made by Mr. De La Vergne for the De La Vergne Company?

249 A. Well, as a matter of fact, he never did tell me he was to purchase the assets, or had purchased it.

39 Q. He had told you that he deemed it advisable and desirable for this company to make that purchase, had he not?

A. He said to me provided he could buy these assets cheap enough it might be a good thing to do. I think those were the very words that he used. I think that was all that was said about it to me.

MR. ALDRICH: When was this?

WITNESS: Why, this was at the time that Mr. Waters and Mr. Guernsey were sent to find out.

40 Q. This was the time when Mr. Waters and Mr. Guernsey were sent out where?

A. Were sent out to investigate and make a report of what assets there were, and their value.

41 Q. Mr. Guernsey was sent out early in January, 1891, to make an investigation of the assets of the Consolidated Ice Machine Company, was he not?

A. I believe that was the time, as (—) I can remember.

42 Q. He made a written report of his doings as the agent of the De La Vergne Refrigerating Machine Company, did he not?

A. Yes, sir; he did.

43 Q. Have you that written report in your possession?

A. No; I have not.

44 Q. What has become of that report?

A. I think it must be among the company's papers here.

45 Q. Your counsel, Mr. Aldrich, on yesterday, or day before, stated that he had possession of that report as I understood him. Does that not refresh your memory that it was handed to him?

A. Yes; I think it was; yes, sir.

46 Q. Would you be able to recognize a copy of that report if it were handed to you?

A. Yes, sir; I would.

47 Q. I wish you would look at those papers and tell me whether that is a copy of Mr. Guernsey's report to your company (handing paper to the witness)?

A. It looks like it, but I would not swear it was an exact copy until I compared it.

48 Q. Will you examine the result reported by Mr. Guernsey as to the value—the net value of the assets of the Consolidated Ice Machine Company, according to his report?

A. I see by this copy of this paper that it states that it is a certain amount.

49 Q. Does that agree with your recollection of the amount as stated by him in his report?

A. I do not remember what the amount was as stated by him in his report.

Mr. ALDRICH: I desire to state that I supposed I had among
250 my papers brought with me to New York a copy of Mr. Guernsey's report. I certainly have such a copy in my possession somewhere. I do not find it, but I agree with counsel that it shall be present at the trial, and that I will get it on or before that time, if possible.

Judge RASSIEUR: Will you also agree that this copy may be used on the trial if the original cannot be found?

Mr. ALDRICH: I want to know something about where this purported copy comes from.

Judge RASSIEUR: Comes from me; made in my handwriting.

Mr. ALDRICH: When did you get it?

Judge RASSIEUR: I made it myself.

Mr. ALDRICH: I mean, on what occasion?

Judge RASSIEUR: The copy?

Mr. ALDRICH: Yes.

Judge RASSIEUR : It was made at Chicago.

Mr. ALDRICH : When ?

Judge RASSIEUR : I understood you to have offered that in evidence at Chicago.

Mr. ALDRICH : That may account for my not having it here.

Judge RASSIEUR : Let me tell you I owe you a full statement of the fact : I made a memorandum of all your exhibits—those that were offered in evidence on May 12th, which we made a part of this deposition as begun on November 5th, and, while making my memoranda and copies, I supposed the paper that contained Mr. Guernsey's report was in exhibit. I called the lady's attention to it after finding that that had not been marked, and she examined her notes—I refer to the lady stenographer—and said that had not been offered, and, of course, I left the paper where I found it with the other exhibits. Now, then, you have all the facts concerning it.

Mr. ALDRICH : I am much obliged to counsel for the statement, and I doubtless laid Mr. Guernsey's estimate of the assets down with the other exhibits, and it thereby became misplaced. I certainly do consent that Judge Rassieur's copy may stand as a copy until the original is produced.

Paper marked New York Exhibit No. 26.

50 Q. Was that report of Mr. Guernsey submitted at this office upon his return from the West, and when his bill for services was paid ?

A. Mr. De La Vergne had the report. It did not come into my possession until a long time after Mr. Guernsey's bill had been paid.

51 Q. You were aware of the payment of Mr. Guernsey for the services rendered by him to the company, were you not ?

A. Yes, sir.

251 52 Q. No objection was made by any one to the payment of his services in proper form ?

A. No, sir ; Mr. De La Vergne audited the bill for payment, and it was paid.

53 Q. Do you recall any conversations about the purchase of these assets with Mr. Rassieur prior to April 16th, 1891, when he came here to see the president of the company for the purpose of conferring with him about the purchase of the assets of the Consolidated—

A. I was not present at the interview, and I don't know anything about it.

54 Q. Do you remember that Mr. De La Vergne in March, 1891, was engaged in a trial at Cincinnati, and was detained there for quite a long while ?

A. Yes ; I believe that was the case ; yes, sir, he was there.

55 Q. Do you remember obtaining information from him for me as to the time that he would be detained there ?

A. No, sir.

56 Q. Do you recall Mr. De La Vergne going to Chicago before the 16th of April, 1891, for the purpose of purchasing or negotiating for the sale of the Consolidated Ice Machine Company's assets ?

A. Never knew that he went to Chicago with any such intention.

57 Q. Do you know of his going to St. Louis with such an intention?

A. No, sir.

58 Q. What was done by your board of trustees, if anything, when Mr. Guernsey's report and bill were brought in?

A. Mr. Guernsey's report and bill were never submitted to the board of trustees.

59 Q. The bill was paid in due course without submitting it to the board of trustees?

A. Yes, sir.

60 Q. As all bills—

A. As all bills—any expense bill.

61 Q. —that were paid. When did that report come into your hands, Mr. Cone?

A. Well, sir, as (—) matter of fact, the original report never did come into my hands; it was only the copy that I had, and that was several months after the report was made.

62 Q. Who brought it here?

A. Who gave me the—

63 Q. Yes.

A. It was either Mr. De La Vergne himself, or Mr. Barron that handed me that paper for filing, stating that it was a copy of Mr. Guernsey's report, and I filed it among my papers after looking at it.

64 Q. Was the contract of April 16th, 1891, already referred to by the counsel of your company, handed to you at that time?

A. No, sir; I never saw the contract.

252 65 Q. Did you know of its having been handed to Mr. Barron?

A. No, sir. I received a copy of it a long time after it was made, I guess, several months after its date, for filing, the same way that I got a copy of Mr. Guernsey's report a long time after it was done.

66 Q. I wish you would examine the letters received by this company, and see whether they contain a letter from me, or any letters from me, within the period of time beginning April 16th, 1891, and ending September 16th, 1891, and make copies of such letters, and append them to your deposition, as New York Exhibit No. 27 A.

A. Yes, sir.

67 Q. What did you do with the copy of the contract of April 16th, 1891, after it came into your possession?

A. I filed it among my papers.

68 Q. You filed it among the papers of the company?

A. Of the company; yes, sir.

69 Q. Can you lay your hands upon that copy now?

A. Yes, sir.

70 Q. I wish you would produce it.

(Witness handed paper to pl'tffs' counsel.)

71 Q. By whom was this copy of the contract of April 16th, 1891, prepared?

A. I don't know, sir.

72 Q. Was it prepared in the office of the defendant company?

A. It may have been; I do not know.

73 Q. You cannot recall when the same was received by you?

A. I cannot remember the date, the exact date. It was a long time after the date of the contract.

74 Q. Did you then bring up this contract at any meeting of the board of trustees for consideration?

A. No, sir.

75 Q. Was there any action taken by the board of trustees at any time disavowing this contract on the part of the De La Vergne Refrigerating Company?

A. There was.

It being conceded that this is a copy of the contract of April 16th, 1891, the same need not be attached as an exhibit afterwards.

76 Q. When did Mr. Waters start out under the employ of this company to engage in work connected with the Consolidated Ice Machine Company, or its creditors?

A. I cannot recollect the exact date—it was some little time after Mr. Guernsey made his report; it was in the summer of that year—1891.

77 Q. Who employed him?

A. Mr. De La Vergne.

78 Q. What was he to do about the Consolidated Ice Machine Company matters?

253 A. The time he went away I did not know personally what he was employed to do, and did not know that he had gone. When he came back, I found that his business had been to see what the claims against the Consolidated Company could be purchased for.

79 Q. He made more than one trip to the West, did he not, on that business?

A. I cannot recollect now, sir, but one trip.

80 Q. He made a report to this company, did he not, of his work?

A. He never made any report to the company that I ever saw.

81 Q. You saw the bills that he rendered for services rendered, and for outlays made by him while engaged in this work, did you not?

A. Yes, sir.

82 Q. These bills were paid as shown by the receipted bills in evidence, were they not?

A. Yes, sir.

83 Q. Was there any action taken by the board of trustees with reference to these bills that were paid to Mr. Waters?

A. No, sir; paid in the same order as Mr. Guernsey's bill.

84 Q. Was the attention of the board of trustees ever called to these bills by any trustee or officer of this company?

A. No, sir.

85 Q. Were these bills entered in your books in such a way that any stockholder, or trustee, or officer could have ascertained the kind of service for which payment was made?

A. Yes, sir.

86 Q. Was there any question ever raised by any stockholder, or trustee, or officer regarding the liability of your company for these services?

A. I don't think I quite understand the question.

87 Q. Was there any question ever raised by any stockholder, or trustee, or officer regarding the liability of your company for these services?

A. No, sir.

88 Q. When was Mr. Jenkins here in the office of the De La Vergne Refrigerating Company for the first time?

A. I could not tell you, sir.

89 Q. I refer to Mr. Robert E. Jenkins, the assignee of the Consolidated Ice Machine Company?

A. I never met him personally that I remember of, and I do not remember of his being here, do not know of his being here.

90 Q. When did the De La Vergne Refrigerating Company first take hold of the plants of the Consolidated Ice Machine Company in the East by doing work thereon?

A. I cannot remember the date; it is on record; I could refer and find out.

254 91 Q. Have you examined the account of work done for Robert E. Jenkins, assignee, and do you know it to be a true copy from your books of all the work done for Robert E. Jenkins, assignee?

A. Yes, that is a true copy.

92 Q. Then the first date that appears in that account is approximately the time when the De La Vergne Company first took hold of the plants of the Consolidated Ice Machine Company in the East with a view to working therein?

A. Yes, sir, I think it is.

93 Q. Had your company done any work—expert work—on these plants of the Consolidated Ice Machine Company prior thereto for the owners of these plants or on your own company's account?

A. Not that I know of.

94 Q. Do you want to modify that answer any?

A. I don't know that there was any extra work done.

95 Q. There appears, then, no charge on your books against the owners of these plants that (have) been put up by the Consolidated Ice Machine Company for extra work done by your company, or its employees, prior to April 16th, 1891, and subsequent to the 14th day of October, 1890, when the Consolidated Ice Machine Company made its assignment?

A. I don't recall any such charges.

96 Q. Have you had made an examination of your books for such charges?

A. I have not.

97 Q. Hasn't Mr. Barron made one at my request?

A. He may have, I don't know.

98 Q. I will ask you to examine your books for any such charges, or for any evidence of payment for any such services as were performed by your company upon the plants of the Consolidated Com-

pany, between the dates stated, to wit, October 14th, '90, and April 16th, 1891; and if you find any evidence of charges or evidence of payment for services rendered, expert or otherwise on those plants, I desire you to attach copies of such entries in your books.

A. I do not find any entries of any charges in that period. After having examined the books I do not find any.

99 Q. Who has or had charge of your correspondence during the year 1891?

Mr. ALDRICH: You mean the company's?

Judge RASSIEUR: The company's correspondence.

A. Each department handled its own correspondence; no general—

100 Q. Who would have handled the correspondence with reference to the matter of the purchase of such assets as the Consolidated Ice Machine Company, insolvent, had to sell?

A. Mr. De La Vergne.

101 Q. Please examine this letter which you have produced, dated July 15th, 1891, written by me to Mr. John C. De La Vergne at Port Morris, which is the name of this place, the place of business of the De La Vergne Refrigerating Company, and state when you first saw that letter?

A. This is the first time I ever saw it, sir.

102 Q. Who answered that letter?

A. I don't know.

103 Q. Who is the custodian of that letter?

A. This letter has been taken today from the files of the De La Vergne Refrigerating Machine Company.

104 Q. Please attach it to your deposition and mark it New York Exhibit No. 27.

(Paper so marked by the stenographer.)

105 Q. I will ask you, though, also, as to whether the answer that was sent is correctly copied on that Western Union blank (handing paper to witness)?

A. I don't know, sir; I could not tell you.

106 Q. I wish you would examine, so as to be able to answer that question, and attach the answer that was sent.

A. I never saw it before, and I have not any means of identifying it.

Mr. ALDRICH: You must have the original.

Judge RASSIEUR: I have, presumably.

Mr. ALDRICH: If Judge Rassieur states that it is a proper copy it may be admitted in evidence that it is.

107 Q. You find on your files attached to this letter, this paper which I hand you now, marked "Copy," and which purports to be a telegram directed to me and signed "D. R. M. Co.," do you not?

A. Yes, sir.

Paper shown witness marked New York Exhibit 28, and to be replaced by original, if produced by counsel for plaintiff.

108 Q. When was Joseph Koenigsberg first employed by the De La Vergne Refrigerating Machine Company?

A. I cannot remember the date, sir.

109 Q. Can you state from an examination of your books and other evidences of payment of salaries to employees?

A. Yes, sir; I can get that information.

110 Q. I wish you would make that examination and state when he was first employed.

A. What do I understand by the word "employed"?

111 Q. That he was engaged to do work for the De La Vergne Refrigerating Company, and under salary or pay which he was to receive from that company for such work.

A. The first date under which we employed Mr. Koenigsberg at a salary was December 1st, 1892.

112 Q. How long did that employment last?

A. I think it was a year, sir.

113 Q. Don't you know of contracts having been made with him prior to that time to work for the De La Vergne Refrigerating Machine Company?

256 A. I think there was a contract existing prior to that time, but not employing him under a salary. It was a trading contract with him.

114 Q. When did that trading contract begin?

A. November, 1891.

115 Q. Did it not begin in September, 1891?

A. I think not, sir. I have just examined the books; the first entries there are in November, 1891.

116 Q. May not the first entries have been made in November, 1891, and the contract have begun in September 1891?

A. Yes, sir.

117 Q. Do you know where the place of business is at which Mr. Koenigsberg was engaged at that time?

A. Yes, sir.

118 Q. Where is it?

A. It is in East 55th street.

119 Q. Is it not 213 East 54th street?

A. 54th street—that is it, sir; yes, sir.

120 Q. That was the place of business of the Consolidated Ice Machine Company while it was in business, was it not?

A. I don't know, sir.

121 Q. He continued to do business at that place while this trading contract lasted, and also while he was working for a salary, did he not?

A. Yes, sir.

122 Q. The contract that you refer to as a trading contract is the same contract or agreement which was offered in evidence as New York Exhibit No. 4, which I hand you for examination now?

A. (Witness examines paper.) No, this is not the contract that I have reference to.

123 Q. If there be another contract with Mr. Koenigsberg in the year 1891 than the one which you hold in your hand, and which

is dated May 1st, 1891, and which is marked New York Exhibit No. 4, I wish you would produce the same.

A. I do not think there is any other one.

124 Q. That contract was modified by the contract which I now show you, dated November 1st, 1892, and which has been heretofore offered in evidence as New York Exhibit No. 3, was it not?

A. Yes, sir.

125 Q. You have heretofore stated that your books show no other matters indicating business connection with Mr. Joseph Koenigsberg than the payments of salary beginning November, 1892, and trading contract matters which began some time in November, 1891. Will you state that there are no other entries in your books referring to a business connection with Mr. Joseph Koenigsberg in the year 1891 than those you have just stated as beginning some time in November, 1891?

257 A. There are no other entries in the books except those that show trading and salary account.

126 Q. What I am particularly after, and therefore call your attention to particularly, is the commencement of your company's connection, business connection, with Mr. Joseph Koenigsberg, and I want to know whether there are any other entries in your books than those which begin, or began, some time about November, 1891?

A. No, sir; there is not—excuse me one moment; let me qualify that a minute. I want to say that the salary under this agreement dated May 1st, 1891, was paid to Mr. Koenigsberg, but it does not appear as an entry in any of Mr. Koenigsberg's accounts. It was charged to our office expense, and this reference here of November 1st, 1891, is the beginning of the showing of what his business accomplished under this agreement; so that while I have stated that there are no entries charged to his account prior to November 1st, 1891, which is correct, at the same time we did pay Mr. Koenigsberg's salary, but it was not charged to either one of these accounts between the dates of the 1st of May, 1891, and the 1st of November, 1891, which I have stated.

127 Q. Or, in other words, your pay-roll account, covering the expense of the office discloses payment of salary to Mr. Koenigsberg from about May 1st, 1891, until the beginning of the account, which was carried in his name, in November, 1891?

A. Yes, sir.

128 Q. While he was under salary to your company, and employed by it, the branch office theretofore used by the Consolidated Ice Machine Company at 213 East 54th street, in the city of New York, was kept going by Mr. Koenigsberg, was it not?

A. I don't know, sir.

129 Q. You have stated in your examination-in-chief that the payments to Messrs. Guernsey and Waters did not appear in any meeting held by the board of trustees, but that these payments were discussed. I would like to have you add by whom were they discussed of the board of trustees, or employees of your company.

A. Seems to me I remember discussing them myself with Mr. Louis De La Vergne.

130 Q. With Mr. Louis De La Vergne?

A. Yes, sir.

131 Q. Do you remember any other discussion of those payments?

A. No, sir.

132 Q. I neglected to ask you how many shares Mr. Gillig, the remaining trustee of the company during the year 1891 held in this company, prior to the increase of stock?

A. He had five shares.

258 133 Q. Did he also receive those shares in the same way that you had received your share from Mr. De La Vergne?

A. I think not; I think he paid for them, as I remember it.

134 Q. Did he attend any meetings of the board of trustees of this company during the year 1890?

Judge RASSIEUR: I withdraw that question.

135 Q. Mr. Gillig is the trusted financial agent, and was in 1891, of Mr. Jacob Ruppert, was he not?

A. I think so.

136 Q. He held no other office in connection with the De La Vergne Refrigerating Company in 1891 than the office of trustee?

A. No, sir.

137 Q. Where were the shares or certificates of stock of the Consolidated Ice Machine Company kept before they were sent to Mr. Charles Noggle of St. Louis, the attorney, in September, 1893?

A. I do not know, sir; I never saw the certificates.

Redirect examination:

1 Q. You say that the subject-matter of this expense was discussed—in what respect?

A. Why, informally among ourselves after it was known.

2 Q. I mean what about—whether as a proper subject of expense, or the amount of it, or what?

A. You are referring now to the expense accounts of Mr. Guernsey?

3 Q. Yes.

A. Mr. Louis De La Vergne and I, I think, discussed them as near as I can remember.

4 Q. I want to know what you said among yourselves; what was the occasion of the discussion?

A. We agreed, I believe, that we were not in sympathy with going into that speculation, creating any expense in that direction.

5 Q. I will ask you whether the books of this company show that it ever paid any expense for the rent of the premises East 54th street, formerly occupied by the Consolidated Ice Machine Company?

A. Paid the office rent?

6 Q. Yes.

A. Yes, sir; it did.

7 Q. After the employment of Mr. Koenigsberg?

A. Yes, sir.

8 Q. Under which contract?

A. Under the modification of the contract of the first day of May, 1891.

9 Q. That was after November, 1892, then?

A. It was after the date of that contract.

10 Q. Get the date of it and tell me?

259 A. (Witness examines contract.) It was after the first day of November, 1892.

11 Q. You may state whether any rent of those premises was paid by this company prior to November 1st, 1892.

A. No, there was no office rent paid prior to November 1st, 1892.

12 Q. I will ask you whether or not you frequently, or if it was customary for you to investigate matters, and charge all expense of such investigation on the books of the company, even although you did not go into it?

A. We were constantly investing money in attempting to get contracts which we did not—a large item of expense in our business, which would include the investigation of circumstances surrounding the proposition.

13 Q. You may state whether this was true of outside matters as well as of business of the company that required investigation?

A. I do not recall any outside matters that required it.

14 Q. For instance, such matters as Porter engine?

A. Well, now, I have answered your question with the understanding that it applied to a certain time here. We have latterly invested considerable money in the development, or rather in the investigation, of business propositions to us outside of our regular machine business. It is only recently we have been doing that.

15 Q. That has always been with a view, as I understand it, of extending the manufacturing industry here?

A. The policy of the company was that it would expend money in investigating a reasonable proposition.

16 Q. In the line of manufacture?

A. Yes, sir.

17 Q. When you speak about knowing that Mr. Guernsey and Mr. Waters were out investigating, I ask you whether you understood that it was with reference to buying claims against the consolidated company—creditors' claims?

A. That is what I understood it to be.

18 Q. When did you first learn that there had been a contract of Mr. De La Vergue to buy stock in this insolvent corporation?

A. It was a long time, certainly several months after the execution of the contract.

19 Q. Was it before or after the commencement of lawsuit about it?

A. Before the commencement of the lawsuit.

20 Q. How long before?

A. I think it was very shortly before the commencement of the lawsuit.

21 Q. There was another question that I intended to ask you originally, and that is whether anybody representing these
260 people who were, by the terms of this contract, seemed to have been selling the stock to Mr. De La Vergue or the com-

pany, as the court may determine, ever came here or investigated the assets or condition of the De La Vergne Refrigerating Machine Company?

A. No.

22 Q. No such investigation has taken place?

A. No, sir, not to my knowledge.

Recross-examination :

1 Q. Was there any investigation made of the assets of the De La Vergne Refrigerating Company by any one or more who proposed to take stock after the increase of the capital stock of the company in May, 1891?

A. No, sir, not any.

2 Q. In other words, I mean who took stock in this company after the increase were willing to take that stock for their hard cash without an investigation of the assets of this company?

A. Yes.

3 Q. Did I understand you correctly when I understood you as saying that Mr. Guernsey went west under employment of the De La Vergne Refrigerating Company, or rather, for a service for which the De La Vergne Refrigerating Company paid him, to buy claims against the Consolidated Ice Machine Company?

A. No, sir, you did not understand me to say that.

4 Q. You desire to be understood that he went on to examine into the assets of the Consolidated Ice Machine Company?

A. That is what he did do. I did not know at the time when he went what he went for.

5 Q. But you learned when he returned what he had gone there for?

A. Yes, sir.

6 Q. After he made his report of the work performed by him?

A. Yes, sir.

7 Q. Did I understand you correctly as saying that it was at least several months after the making of the contract of April 16th, 1891, before you first learned of such a contract, or was it before you learned the terms of the contract?

A. Before I learned that there was any such contract in existence.

8 Q. Was that the time when you received a copy of that contract which you had among the papers of this company?

A. I received a copy of the contract about that time.

9 Q. Have I asked you to attach a copy of the account of Mr. Koenigsberg with the De La Vergne Refrigerating Company to your deposition? If not, I want to ask it, and it is to be appended and marked New York Exhibit No. 29.

(Signature of witness waived by consent.)

261 JOSEPH KOENIGSBERG, called as a witness by the defendant company, being sworn, testified as follows:

Direct examination.

By Mr. ALDRICH:

1 Q. You may state your name, residence and occupation.

A. Joseph Koenigsberg; 213 East 54th street, New York; selling agent for ice machines.

2 Q. Were you formerly connected with the Consolidated Ice Machine Company, and, if so, in what capacity?

A. I was secretary of the Consolidated Ice Machine Company.

3 Q. How long were you with that company?

A. Since it originated in 1884 until it failed.

4 Q. In October, '90?

A. October, 1890.

5 Q. After the failure of the Consolidated Ice Machine Company and the appointment of Mr. Jenkins as assignee, what steps were taken immediately to finish the contracts which the Consolidated Company had on hand and in course of completion?

A. What course was taken?

6 Q. What steps were taken?

A. Mr. Jenkins, the assignee, came to New York, and decided to finish those contracts, and asked me if I would assist in doing this, helping to do this. We agreed to a certain payment, which was to be made to me, per week for my services, and I was engaged by Mr. Jenkins to supervise the finishing and the completion of the contract.

7 Q. You had a number of important contracts then in process of completion?

A. Good many of them—a very large number of them.

8 Q. A considerable portion of the assets upon which you expected to realize in the payment of your creditors—

A. Yes, sir.

9 Q. —was in the shape of these contracts and the payments to be made thereunder?

A. Yes, sir.

10 Q. These contracts were, as I understand, to be completed by their terms against a certain time, and under penalty for non completion within that time, in most instances?

A. Yes, in most instances. In most instances there was an agreement to guarantee to deliver those plants at a certain time in operation, provided certain things did not happen; that is, in each contract there was a clause which said that we would agree—when I say “we” I mean the Consolidated Ice Machine Company—to have the plants in running operation at a certain time, provided circumstances not under the control of the company did not interfere with it; that was the clause in nearly every contract.

11 Q. But for any failure on the part of the company you had to pay a penalty by the terms of the contract?

262 A. Well, to us any penalties were never made, but it was consequential—

Judge RASSIEUR: Objected to. The contracts speak for themselves.

12 Q. Have you copies of the contract to which you have referred?

A. No, I have not; they are all in the hands of the assignee; I returned all the papers to him.

13 Q. I have understood that they had penalties from 30, and after a certain number of days, as high as 50 dollars per day for non-completion?

A. There may have been some such penalties, but I do not remember, because I haven't the contracts before me; there were a good many of them.

Judge RASSIEUR: I object to all testimony as being secondary, and the contracts, being within easy reach, are the best evidence of what is contained therein.

14 Q. As matter of fact, the contract price was not realized by the assignee in many instances, was it?

A. I know of some instances where he did not get the full amount of the contract price.

15 Q. Something has been said in the testimony, Mr. Koenigsberg, with reference to an effort on the part of Mr. De La Vergne, or other officers and employees of this company, seeking to prevent the assignee from realizing the full contract price, and to prevent the realization by him of the full value of these assets. Do you know of any such attempts on the part of—

A. I don't know of any such thing.

16 Q. I will refer to your relation with Mr. De La Vergne and this company later, but ask you now whether you were so related to the business of this company, and to the completion of those plants, that if there had been any such attempts on the part of Mr. De La Vergne, or the employees of this company, you would have known it?

A. Certainly I would.

17 Q. Were there any such attempts?

A. I never noticed them.

18 (—). Proceeding now to the action of the stockholders in this company after it had made its assignment, I will ask you when it was first determined that the stockholders in and of themselves would not be able to resume business, but would have to get a connection with outside parties?

A. You mean the stockholders of the Consolidated Ice Machine Company?

19 Q. Yes.

A. That was decided or talked about at the time when Mr. Rasseieur and Mr. Jenkins visited New York, in November, 1890.

263 20 Q. You may state whether or not you had seen Mr. Elkins of the Penn. iron works before, or soon after, that time.

A. I did not see him before, but I saw him after that time.

21 Q. And in pursuance of the conclusion then reached, that some such connection would be necessary to enable the Consolidated Company to resume?

A. Yes.

22 Q. You had negotiations with Mr. Elkins of the Penn. iron works looking to his becoming the purchaser of the assets of this company?

A. Yes, sir.

23 Q. Have you any memoranda or data which will enable you to state when those negotiations failed?

A. Yes, I have.

24 Q. Please produce it. I call your particular attention to a letter, and copied in your letter book under date of 11th day of March, 1891.

A. The date of the 11th of March, 1891, Mr. Elkins was in my office, 213 East 54th street, and met there Mr. Rassieur and myself, and we discussed at that time the matter of him purchasing the stock, and after considerable length of time he left the office, giving up the idea, entirely ceasing any further communications, and Mr. Rassieur wrote on that same day to Mr. Jenkins, the assignee, giving him report about that meeting.

25 Q. I will ask you to kindly produce your letter book, and allow the said letter to be read into your evidence; then you are to get also the letter that you wrote to Mr. Jenkins the next day.

(Witness produced letter-book.)

Letters marked respectively New York Exhibits 30 and 31.

Witness also produces copy of contract as prepared by Judge Rassieur, and referred to in his letter, and the same is attached and marked New York Exhibit 32.

26 Q. You may state whether you had any communication with Judge Rassieur upon his return to St. Louis. I call your particular attention to his letter of March 16th.

Witness produced letter of March 16th, and a copy is attached and marked New York Exhibit No. 33.

27 Q. Have you the letter of March 18th?

A. (Witness produces letter.)

Letter of March 18th from Judge Rassieur to witness is offered in evidence, and marked New York Exhibit 34.

28 Q. After the completion of the contract in Chicago on the 16th day of April, Judge Rassieur sent you certain stock, I believe, to be delivered?

A. Yes, sir.

29 Q. To whom did you make this delivery?

A. To Mr. John C. De La Vergne, president.

264 30 Q. Have you any copy of his receipt therefor?

A. I have not, because he receipted it under original letter of Mr. Rassieur, where he says "Enclosed please find stock; hand it to Mr. De La Vergne," and he receipted it on the foot of that let-

ter. That is the reason I have not got a copy of it. I returned it to Mr. Rassieur.

31 Q. You afterwards entered the service of the De La Vergne Company?

A. No, not before May. During the time I was with the assignee, the assignee allowed me to sell, close a few contracts which I was able to get, by selling a few machines which the Featherstone Company had in stock, and during that interval I sold a 50-ton machine to Philadelphia—to a party in Philadelphia, by the name of Roehm, and another to India Wharf Brewing Company, in Brooklyn, a 75-ton machine, and a 50-ton machine to Schmitt & Schwandenfluegel in New York.

32 Q. When was this last sale made?

A. Before I entered the employ of De La Vergne.

33 Q. And before or after the contract of the 16th of April?

A. Certainly before that.

34 Q. Before that?

A. Yes, sir.

35 Q. Then you entered the service of the De La Vergne Company on the first day of May, 1891?

A. Yes, sir.

36 Q. That contract has been introduced in evidence?

A. I suppose so, I haven't seen it.

37 —. It has. What did you do for the De La Vergne Company during the first six months of your service?

A. I was trying to sell machines, and I closed several contracts for machines.

38 Q. What contracts did you close, and for what kind of machines?

A. I closed contracts for three 35-ton machines with the Reading Cold Storage Company, Reading, Penn.; one 50-ton machine to Ebling Brothers, Morrisania; two 50-ton machines to Philadelphia Packing & Provision Company; one refrigerating plant to the Trenton Brewing Company—that was only a pipe plant, no machine, and several other repair jobs for pipe-work and so on, which I can't recollect.

39 Q. In this piping, as you describe it, there was no ice machines?

A. No refrigerating machine in there. There were no machines on the premises, and I solicited—I got this work.

40 Q. From whom did you purchase the machines?

A. From the Featherstone Company.

41 Q. Who bought the machines of the Featherstone Company?

A. I did.

42 Q. Who paid for them?

A. I did.

265 43 Q. What connection, if any, did John C. De La Vergne of the De La Vergne Refrigerating Company have with your purchase from the Featherstones?

A. None whatever.

44 Q. The Featherstones were engaged in building these machines

and selling them right along after the 30th day of January, 1892, were they not?

A. They sold me machines before that time.

45 Q. Yes, before that time and after that time?

A. After that time too.

46 Q. You have spoken of various sales. I will call your attention to New York Exhibit No. 6, being a sale to the Bavarian Brewing Company of New York City. Is that one of the sales that you refer—

A. That was made later; that was made in '92, I think that sale—have you reference to the year '91? The Bavarian Brewing Company I sold later on; that was in '92. I think the date of the contract will show it.

47 Q. You spoke of a sale to the Ebling Brewing Company?

A. That is it.

48 Q. That is also in '92, according to the date; what do you say?

A. That is correct.

49 Q. I see here is a sale to Henry Chris?

A. That is the Reading Cold Storage Company.

50 Q. Under date of October 17th 1891?

A. Yes.

51 Q. That is February 8th 1892 to the Reading Cold Storage Company?

A. The last one, yes, sir. I think I sold them three 35-ton.

52 Q. I will ask you whether you know the Featherstones were engaged in building and selling Consolidated ice machines between the 30th day of January, 1892, and July of that year?

A. I know they were.

Judge RASSIEUR: Objected to as being entirely immaterial and irrelevant.

53 Q. Do these sales to the Reading Cold Storage Company, to the Ebling Brewing Company, Bavarian Star Brewing Company and the Philadelphia Packing and Provision Company represent all the sales you made of Consolidated ice machines after your contract with Mr. De La Vergne?

A. Yes, sir. I beg your pardon, I sold later on in the year '93 and '94, I sold machines.

54 Q. You did?

A. Yes.

55 Q. To whom and what—

A. I sold two 65-ton machines to the Stagnmeyer Brewing Company in Williamsburg.

56 Q. By whom were all these machines built?

A. By Featherstone.

57 Q. And all purchased by you?

A. Purchased by me.

266 58 Q. Who erected the machines?

A. Which machines do you refer to, during the time I was in the employ of Mr. De La Vergne?

59 Q. Yes.

A. Different engineers; I can give you the name.

60 Q. I mean was it done for you or by you or for the De La Vergne Company and by the De La Vergne Company?

A. I do not understand that question. The De La Vergne Company don't erect no machines; machines were erected by certain engineers.

61 Q. I mean whose service?

A. I engaged those men, and the De La Vergne Company paid those men. I wrote out pay-rolls every week, handed them over to De La Vergne Company, and they sent me money and I paid the men in accordance with my contract.

62 Q. When did you discontinue your connection with the De La Vergne Company?

A. In June, 1893.

63 Q. Was that before or after the sale to the Stagmeyers which you have mentioned?

A. Before the sale to Stagmeyer was made.

64 Q. So that the De La Vergne people had nothing to do with that sale?

A. Nothing whatever.

65 Q. Who collected the money for these machines erected while you were with the De La Vergne Company?

A. I.

66 Q. And paid it over to the De La Vergne Company?

A. I collected the money; the money was paid to me, checks to my order, and I gave my own checks to the De La Vergne Company.

67 Q. I believe the De La Vergne Company was adjudged to be the owner of the Boyle patent?

A. Yes, sir, that was the reason I connected myself with it.

68 Q. The Boyle patent is a patent used in the construction of the Consolidated Ice Machine Company's plant?

A. The compressor, yes, sir.

69 Q. You had some arrangement, I believe, with the De La Vergne Company by which you were to be exempt from any license fees in the machines sold by you as to Boyle patent?

A. Certainly; not alone those; did not charge license fee on the machines which I sold during the time I had my contract with them. They even relieved me from the license fee which I would have been compelled to pay for the two machines which I sold before I entered into the agreement with them; in the interval between November and May, I sold two machines or three; they even relieved me of that license.

70 Q. State whether you had a contract with Featherstone before you made any arrangement with De La Vergne?

267 A. Yes, sir; I did have a contract with Featherstone.

71 Q. To what effect?

A. That I was to be their sole—that they were to furnish me—
Judge RASSIEUR: Is that contract in writing?

WITNESS: It is in writing.

Judge RASSIEUR: I would like to have the contract produced.

WITNESS: Yes, sir.

Witness produces contract under date 16th of August, 1892, and a copy of the same is attached, and marked New York Exhibit 35.

72 Q. An advertisement has been offered in evidence here marked New York Exhibit No. 1?

A. You mean advertising or circular?

73 Q. It is an advertisement I think we refer to, in which you made an announcement through, I think, the columns of the *Brewers' Journal* to the public?

A. Yes, sir.

74 Q. I will ask you to state who inserted that advertisement and paid for it?

A. I inserted it and paid for it.

75 Q. Now, you may state, Mr. Witness, whether or not in any of your advertisements, circulars or in any of your dealings with any of the parties selling any of these machines, you ever represented or claimed that the De La Vergne Company or yourself, either one of you, owned the good will of the Consolidated Ice Machine Company?

A. I never did.

76 Q. You may state whether or not any such representations were ever made so far as you know, by either yourself or any officer or agent of this company?

A. I certainly can only answer for me; I don't know what somebody else may have done; I never did, or my representatives; they were never authorized to do it.

77 Q. And then it follows, as I understand the answer to my question, that you never procured any contract through any such representation?

A. No, sir.

78 Q. What, if anything, did you say about the De La Vergne Company owning the Boyle patent?

A. This is what I said: I said I made arrangements with the De La Vergne Company, who are the owners of the patent, and they would later on go in manufacturing those machines.

79 Q. Under this patent?

A. Under that patent—later on that they would manufacture these for sale.

80 Q. You may state whether or not they ever did manufacture any of those machines?

A. I never sold the machines which they manufactured, and I do not know that they ever manufactured one.

268 81 Q. Have you a copy of your circular which you issued on or about September 14th, 1891?

A. I have.

82 Q. Will you kindly produce it, Mr. Koenigsberg?

Witness produced copy referred to, and it was marked in evidence New York Exhibit No. 36.

A. The circular which I gave you was the circular I sent around. A copy of that was published also in a paper; I considered that the right kind of advertisement.

83 Q. Have you a copy of the proposition made by John Featherstone's Sons, through Mr. Thomas, their representative, to the De La Vergne Company with reference to this circular you have just put in evidence, or the letter which the—

A. I believe I have.

84 Q. —the De La Vergne Company sent to users of the Consolidated machine?

A. I have.

85 Q. Where did you get this proposition?

A. From Mr. Thomas.

86 Q. Who was Mr. Thomas?

A. Representative manager of the concern.

87 Q. J. Featherstone's Sons?

A. Yes, sir.

88 Q. Did you receive it about the time it bears date?

A. Yes, sir; on the same date—it was written out on the same day.

89 Q. What did you do with it?

A. I gave it to Mr. De La Vergne.

Communication bearing date New York November 5th, 1891, is put in evidence, and marked New York Exhibit 37.

90 Q. You may state whether the De La Vergne Company accepted this proposition or not?

A. It rejected it.

Judge RASSIEUR: I object to that testimony as entirely immaterial and irrelevant to the issues in this case, and as having no connection with the plaintiffs whatever.

91 Q. I believe that Mr. De La Vergne made some attempt to settle with the creditors of the Consolidated Ice Machine Company, did he not? That is, by purchasing their claims through Mr. John R. Waters?

A. I do not have a very faint recollection of that; I had nothing to do with this business; I only remember that Mr. Waters was to be sent West to buy up claims, I heard talk about that.

92 Q. You know that he offered 60 cents on the dollar, don't you?

A. Yes.

93 Q. And later did you have any relations with Knights & Botts, trustees for certain creditors?

A. Knights & Botts and Mr. Thomas came here and asked me to assist them in buying up claims—creditor claims—for
269 them, which they offered at 40 cents on the dollar, and I had them considered.

94 Q. They bought a lot of claims at that price?

A. A considerable lot of claims here, and I, myself, furnished them at least 35 different claims.

95 Q. At that price?

A. Yes, I bought—settled those claims for them.

96 Q. They were trustees, I believe, for certain creditors?

A. Yes.

97 Q. Under the modified agreement of November, 1892, the De La Vergne Company paid the rent of the office in East 54th street, and also of your assistants?

A. I do not believe they ever paid the rent. I charged the rent as expenses in the expense account.

98 Q. They paid all expenses?

A. Yes, they paid the expenses, but the office was rented to me, and I paid my rent by my check to the Price Brewing Company, my landlord.

99 Q. When was the office rented to you?

A. To me personally?

100 Q. Yes.

A. In May, '92, the time when I made the contract with De La Vergne.

101 Q. That is May, 1891?

A. May, '91.

102 Q. Have you a copy of the advertisement inserted by John Featherstone Sons in the Western Brewer, of 1892?

A. I don't think I have.

103 Q. What was the total capital stock of the Consolidated Ice Machine Company?

A. \$200,000.

104 Q. How much was paid in on account of this capital stock?

A. \$100,000.

105 Q. Did Mr. Bushnell pay any on account of his subscription of \$50,000?

A. Mr. Bushnell?

106 Q. Yes.

A. I don't know that he subscribed \$50,000.

107 Q. Subscribed \$50,000, I believe, and then also \$50,000 treasury stock, making a total subscription by Bushnell of \$100,000, as I recollect it.

A. I don't know that; I don't recollect it.

108 Q. For the purpose of refreshing your recollection I will ask you if he did not pay \$10,000, and failing to pay the rest his stock (—) forfeited.

A. Yes, sir, I remember that. I don't know whether it was \$10,000; I forget; I don't know.

109 Q. The company owned that stock?

A. Yes, I believe it was. I don't recollect it; I had nothing to do with the books.

110 Q. Mr. Koenigsberg, you may state whether it was found practicable to make a settlement with the creditors and get the assets out of the hands of the assignee.

270 Judge RASSIEUR: If you know.

Mr. ALDRICH: If you know, yes.

A. I do not understand the question.

111 Q. Whether it was found practicable to get a settlement with the creditors, and to get the assets out of the hands of the assignee, whether it was found possible to make a settlement?

A. I tried it and did not succeed.

112 Q. Others tried it also, did they not?

A. As far as I understand, yes.

113 Q. And there was not assets sufficient to pay them in full, Mr. Koenigsberg?

A. No, there were not assets enough to pay the claims in full.

114 Q. I wish you would state, Mr. Koenigsberg, what assets, property or other thing of value the De La Vergne Refrigerating Company, or Mr. De La Vergne ever received under the contract of April 16th, 1891; what did they ever get for it?

A. I don't know of anything.

115 Q. The plan was, as I understand it, to get a compromise with the creditors by getting them, majority in number and amount, take the assets, discontinue the assignment proceedings, and then turn over the business and continue it.

A. That was the intention.

116 Q. When it was found impossible to get such a settlement what was said or done with reference to holding Mr. De La Vergne and the De La Vergne Refrigerating Machine Company liable on this contract? I refer particularly to any conversations that you may have had with Judge Rassieur.

A. I never knew anything about it, never had a word—never saw Mr. Rassieur at that time.

117 Q. Did you meet Judge Rassieur frequently or otherwise?

A. When do you mean, before or—

118 Q. From April 16th, 1891, on.

A. I do not believe we met once in that time, since 1891. I don't think I saw Mr. Rassieur since that time.

119 Q. What is Mr. Skinkle's business? Do you meet him frequently?

A. I have not seen him neither.

Cross-examination.

By Judge RASSIEUR:

1 Q. You have stated that you were connected with the Consolidated Ice Machine Company from the time of its creation in 1884 until the date of its failure, or assignment, on October 14th, 1890. During all that time the company did a large business, did it not?

A. Yes, sir.

2 Q. Particularly in the East, in that part of the United States of which you had charge, as its agent?

A. They did.

271 3 Q. You were considerable of a competitor with the De La Vergne Refrigerating Company, were you not?

A. I was.

4 Q. The work of the Consolidated Ice Machine Company was as successful as the work of any other company, was it not?

A. It was.

5 Q. There were no more complaints about its work than the work of any other competitor in the field of refrigerating and ice-making machines?

A. No.

6 Q. No dividends had been declared by the Consolidated Ice Machine Company up to the time of its assignment?

A. No, sir.

7 Q. Everything that it had earned had gone into building up this business?

A. It did.

8 Q. State, if you please, if the reason of its failure in October, 1890, was because of an insufficient amount of business done by that company, or because of its undertaking to do more than it could do with its capital?

A. The latter was the case.

9 Q. How much in amount was the work that it had obtained to be done for the year 1890, that is, to be used in the summer of 1890, in round figures, approximately?

A. About \$1,300,000.

10 Q. Was this work taken upon profitable lines and figures, or otherwise?

A. Prices were considerably higher.

11 Q. Higher than they had ever been before; is that not true?

A. Yes, sir.

12 Q. So that the failure when it came was not because of insufficient work, or unprofitable work, but simply because it undertook to do more than it could do with its capital?

A. I believe that was the reason.

13 Q. Don't you know that to be the fact, Mr. Koenigsberg?

A. Yes, I know.

14 Q. After the failure it was attempted to preserve the good will of the company by relieving the company from the assignment, was it not?

A. Yes, sir.

15 Q. You know that the good will had a positive value at that time, had it not?

A. Yes, sir.

Mr. ALDRICH: Objected to as calling for an opinion.

16 Q. What do you deem a fair valuation for the good will of the Consolidated Ice Machine Company at the time, or immediately prior to its failure on October 14th, 1890?

Mr. ALDRICH: Objected to on the ground it is incompetent and immaterial, and that the witness is not qualified to express an opinion upon that subject; the good will, if any, passed to the assignee, and was not the subject of sale by the stockholders.

272 17 Q. Now, what is your opinion?

A. I think the good will was of considerable value, but I do not think I would be able to name figures, quote figures for it.

18 Q. Could such a good will have been acquired with an expenditure of less than \$50,000, in your judgment, you, as a salesman, knowing what it costs to go into the market and create a good will?

Mr. ALDRICH: Objected to, as the best evidence of what the good will is worth is what the assignee has succeeded in selling it for, if anything; and, in the second place, that the question does not conform to any facts in this record, as it could not have been acquired, except upon the payment of debts aggregating \$550,000, or more, it being the property of the assignee.

A. I don't think it could.

19 Q. Do you know what the patterns and drawings of the Consolidated ice machine had cost it, approximately?

A. I only know approximately.

20 Q. State, if you please?

A. About \$100,000.

21 Q. Those had a value in carrying on the business of building the machine known in the market as the Consolidated ice machine, had they not?

A. I could not say that.

22 Q. Could such machines have been constructed without the patterns and drawings that had been made, or without making new ones for such a construction?

A. No, not without making new drawings and patterns.

23 Q. Then these were valuable and essential in the building of Consolidated ice machines, or the machines known to the market as the Consolidated ice machine?

A. Yes.

24 Q. You have spoken in your examination of the Boyle patent. Is it not a fact that the Boyle patent covered nearly all the removable cages containing the valves of the compressors used in connection with the Consolidated Ice Machine Company machines?

A. That is what it did.

25 Q. That machine could have been constructed with cages holding the valves that were not removable, without taking out the compressor, could it not?

Mr. ALDRICH: Objected to as incompetent and immaterial, and calling for the opinion of the witness, he not having been qualified.

26 Q. Let me put my question in a different form so as to make it intelligible. A machine of the same general type, vertical, operating in the same general manner as the machine which was constructed by the Consolidated Ice Machine Company, could have been constructed without making use of the removable cages holding the valves attached to the compressor, could it not?

A. It could.

Mr. ALDRICH: Same objection as to form.

27 Q. The only difference between the construction of a machine

of the Consolidated pattern, as constructed by the Consolidated Ice Machine Company making use of the Boyle patent, and one constructed in the same general form, and having the same capacity without removable cages, would have simply differed in this, that in one case the compressor had to be taken out to repair a breakage or deficiency in the valve, and, in the other case, the cage holding the valve could have been taken off, leaving the compressor in position, and thus repair the deficiency or improper working of the valve. Is not that the entire difference between the two?

A. That is the entire difference.

28 Q. Do you remember, Mr. Koenigsberg, that an examination was made of the plant put up by the Consolidated Ice Machine Company for the Consumers' Hygienic Ice Company prior to April 16th, 1891, by the De La Vergne Refrigerating Company, or its employees?

A. Have you reference to the Consumers' hygienic plant here in New York?

29 Q. Here in New York; yes.

A. Yes.

30 Q. Do you know what opinion they gave about the Consolidated plant?

A. I really forget that.

31 Q. Was it an unfavorable one?

A. It was in no case unfavorable.

32 Q. What was the result of that opinion, or in other words, did not that company refuse to pay the amount owing to the Consolidated Ice Machine Company on account of such unfavorable opinion?

A. I really don't know, Mr. Rassieur, and I must say that I mistook your first question, I did not know what you had reference to; I thought that you meant if the De La Vergne Company had examined our plant there before it was finished, while it was erected, and so on, and gave their judgment from it, but I don't know what you meant to say. You meant if the De La Vergne Company had ever given their opinion about that plant after it was erected and started?

33 Q. After it was erected and started and before April 16th, 1891?

A. I don't know that, Mr. Rassieur.

34 Q. Was any such examination made of the New York Steam Company's plant by the De La Vergne Company and its employees?

A. I do not recollect.

35 Q. Don't you remember that that was urged as a reason for refusing the money due the Consolidated Ice Machine Company's assignee?

274 A. I don't know; I do not remember that.

36 Q. Don't you know of such an examination having been made by the De La Vergne Refrigerating Company or its employees of the plant put up in Trenton for the Trenton Company by the Consolidated Ice Machine Company?

A. I do not recollect.

37 Q. Don't you know that that examination and its result was urged as a reason for refusing to pay for that plant?

A. Certainly not, Mr. Rassieur, because I made the demand for the money in Trenton, and I don't recollect that they gave that ever as a reason.

38 Q. Don't you remember that it was told you that such an examination had been made by the De La Vergne people?

A. No; I don't recollect that.

39 Q. Do you know at all of any such examination, expert examination, as it has been called, having been made of the plants put up by the Consolidated Ice Machine Company in the East which were not paid for at the time of the assignment on October 14th, 1890, such examinations having been made prior to April 16th, 1891?

A. I don't know of any; I don't recollect.

40 Q. You know of the sending out of Mr. Guernsey by the De La Vergne Refrigerating Company to examine the assets of the Consolidated Ice Machine Company then in the hands of Mr. Robert E. Jenkins, assignee, do you not?

A. I know that through you.

41 Q. Did not Mr. Guernsey also come to you for information concerning the eastern plants and the amount owing and due from such plants?

A. Yes, I believe that he returned from the West and came to me.

42 Q. That examination was made prior to April 16th, 1891, which is the date of the contract—

A. Certainly.

43 Q. —between the De La Vergne Refrigerating Machine Company and the Consolidated Ice Machine Company. 213 East 54th street in the city of New York had been the branch office of the Consolidated Ice Machine Company for how long?

A. For 18 months before its failure.

44 Q. And it continued to be the office of the assignee how long after the assignment was made?

A. Until May, '91—no; it may be 4 weeks longer, because even after I entered the employ of De La Vergne, I conducted some business for the assignee, so consider then it was still his office; he did not pay anything for it, and the De La Vergne Company did not charge anything for it.

45 Q. The failure to make the Consolidated Ice Machine Company a going concern—that is, the failure to take it out of the hands of the assignee gradually had the effect of reducing its good will in value, did it not?

A. It certainly had.

46 Q. Whatever was possible to do in the matter of selling that good will had to be done quick, had it not?

A. It would have been of much more advantage to be done quick.

47 Q. Every day's delay in putting that concern in the position of taking and doing work reduced its good will in value?

A. I should think so.

48 Q. There had been considerable delay in the matter of dealing

with those who desired to buy the assets of the Consolidated Ice Machine Company, had there not been?

A. If you refer to my party, the party I brought in, the Penn. iron works?

49 Q. The Penn. iron works?

A. That lasted from January to the middle of March.

50 Q. During all of which time you were busily engaged in endeavoring to have them take action?

A. Yes, sir, I did.

51 Q. Mr. De La Vergne was absent from the city of New York during the month of March, after making an appointment with me for the discussion of that matter, was he not?

A. I know he was absent from the city of New York during the month of March, up to the middle of the month of March; I know that, but I don't recall the appointment he had made with you. I think you spoke to me about it but I don't recollect.

52 Q. You remember that I waited here quite a number of days anticipating his return, do you not?

A. I do.

53 Q. And that I then left with the announced purpose of endeavoring to see him at Cincinnati where he was detained in attending upon a lawsuit?

A. Yes, sir, and you reported to me, you wrote to me that you saw him there.

54 Q. Yes. Didn't the Penn. iron works make another proposition after they declined to assume the liabilities of the Consolidated Ice Machine Company?

A. They did.

55 Q. Wasn't that proposition sent to me at St. Louis to be placed before the stockholders and directors of the Consolidated Ice Machine Company?

A. I was under the impression that it was left with you in Chicago, and not me. I could not swear to you that it was mailed to you or left with you, but the fact of it is that such proposition had been submitted to you. I don't know.

Mr. ALDRICH: I do not care to re-examine on this subject, so I call attention to the fact that those communications were the last days of December and the first of January, and no proposition after March 11th, 1891.

276 Judge RASSIEUR: I have the identical propositions before me.

Mr. ALDRICH: I- you have any such proposition I beg you to produce them.

WITNESS: Did you ask me if I know that any propositions were sent to you after March 11th—after the middle of March?

56 Q. After the interview with Mr. Elkins at the office of the Consolidated Ice Machine Company, or rather its branch office in New York, and which proposition substantially was one to purchase the assets freed from the liabilities of the Consolidated Ice Machine Company?

A. Yes, such proposition I know of, but I do not remember when it was sent to you, or given to you; I don't recollect that.

57 Q. The Penn. iron works had also made a very thorough examination of the assets of the Consolidated Ice Machine Company, had they not?

A. They did.

58 Q. They examined into the value of the outstandings as well as the value of the plant in Chicago?

A. They did.

59 Q. That concern is a large concern, having some millions of capital?

A. Yes, sir.

60 Q. Amply able to purchase and pay for anything as large as the assets of the Consolidated Ice Machine Company?

A. Yes, sir.

61 Q. They had not theretofore engaged in the business of manufacturing and selling refrigerating machines and ice-making plants, had they?

A. Not at that time.

62 Q. Their purpose was as stated by them, to enter that business after the purchase of the plant of the Consolidated Ice Machine Company?

A. Yes.

63 Q. They proposed, in other words, to become a competitor of the De La Vergne Refrigerating Machine Company, more particularly in the East and throughout the United States?

A. Most assuredly.

64 Q. Was the world made acquainted with the fact that you had entered into the contract of May 1st, 1891, with the De La Vergne Refrigerating Company?

A. Yes.

65 Q. By what advertisement or communication was such notice given?

A. By circular and my advertisements.

66 Q. Is it not a fact that your circular and advertisements, as they have been offered in evidence here, were not published until October 1891?

A. They were printed in September.

67 Q. Or in September?

A. It may have been delayed in mailing.

68 Q. This is an advertisement made by you October 15th, 1891, in the Western Brewer, is it not?

277 Mr. ALDRICH: I request you to produce for my inspection copies of any proposition from the Penn. iron works subsequent to March 11th, 1891.

Judge RASSIEUR: I will, on the trial.

Mr. ALDRICH: It will save the necessity of going there. I am advised there was no proposition after that date.

WITNESS: I certainly issued that advertisement.

69 Q. And at the time stated on this page of that publication, October 15th, in the year 1891?

A. I did.

Advertisement offered in evidence, and marked New York Exhibit No. 38.

Mr. ALDRICH: I had understood Judge Rassieur to exhibit certain papers, which, he says, he holds in his hands, and which are now on the table in front of him, and state that they are propositions made by the Penn. Iron Works Company after March 11th, 1891, and declared his purpose to use them on the trial. I desire to take testimony of the officers of the Penn. Iron Works Co. unless he is willing to produce the papers which I hereby request him now to do, for my inspection, stating on the record that I am informed that all the negotiations terminated at the date I have named.

Judge RASSIEUR: I have no objection to defendant's taking the testimony of any and everybody that knows anything about this case, providing he is ready for trial on November 20th, the date agreed upon. Plaintiffs' counsel also states that he will gladly produce his evidence on the trial of this case, as he has all along said he would do, and declines to make a showing of his testimony at this time, but will gladly produce all evidence to which the defendant will make no objection.

Mr. ALDRICH: I hereby give counsel for the plaintiffs notice on the record that I have been advised as stated, and that I require the production now of the papers for inspection, and also all other papers for inspection, that he proposes to use on the trial of the case. If this notice on the record is deemed insufficient, I will reduce it to writing to comply with the statutory requirement; otherwise I do not feel bound to proceed with the case on the 20th. I also inquire of counsel whether he requires formal written notice of the adjournment from here to the office of the Penn. iron works for the purpose of taking testimony should it be deemed necessary, or whether he will accept this statement upon the record as notice.

Judge RASSIEUR: Counsel for plaintiffs has consented to the taking of depositions at Chicago, and New York, without notice, and has consented to its being put off until shortly before the
278 setting of this case. Counsel is still further desirous of obliging the defendants in this case, and therefore is willing that this deposition be adjourned to some place in Philadelphia for the purpose of taking the depositions of any one or people connected with the Penn. iron works without formal notice to that effect.

Mr. ALDRICH: It will be so understood then.

Judge RASSIEUR: Time and place, hour and place to be stated when the deposition is to be proceeded with in Philadelphia.

Mr. ALDRICH: It will be so understood and stated at the conclusion of this testimony, if other means are not found to ascertain the fact which I have asked Judge Rassieur to supply, and which he has professed an ability to supply from the papers before him.

70 Q. Mr. Koenigsberg, from your answer made a moment ago, I infer that there was no publication of your connection with the

De La Vergne Refrigerating Company prior to the issuing of your circular, your printed circular dated September 14th, 1891, and prior to the publication of the two advertisements which are in evidence in this case?

A. I don't believe they were.

71 Q. It is a fact, is it not, that you continued to pay for the rent of the former branch office of the Consolidated Ice Machine Company with your own checks as before?

A. I did.

72 Q. The expense of that office were also paid for by you out of your own bank account.

A. Out of my own bank account.

73 Q. And the moneys thus expended in the running of that office were refunded to you by the De La Vergne Refrigerating Company upon an expense account furnished by you to the said company?

A. Yes, sir.

74 Q. The 250 machines that had been put up of the Consolidated pattern, and that were in actual operation in breweries, packing-houses and (four) storage houses, referred to by you in your advertisement, which has been made New York Exhibit 39, were machines put up by the Consolidated Ice Machine Company, were they not, in the main?

A. By the Consolidated Ice Machine Company, and by those companies whom the Consolidated succeeded; that is, the Empire and the Boyle.

75 Q. The Boyle patent referred to in that advertisement is the same pattern concerning which you have been interrogated already?

A. Yes, sir.

76 Q. In seeking contracts or soliciting contracts for the erection of ice plants, and refrigerating machinery, after the first of May, 1891, you ostensibly sought them for yourself, and made the contracts in your name?

A. I did.

279 77 Q. After the contracts were obtained, you made an assignment of the contracts to the De La Vergne Refrigerating Machine Company?

A. I did.

78 Q. In making the contracts with the Featherstone's Sons firm in Chicago, for the building of ice machines or refrigerating machines, that were to be used in filling orders obtained by you, after the first of May, 1891, you represented that such contract was for yourself only?

A. I did.

79 Q. You did not disclose the fact to that firm that you were in the employ of the De La Vergne Refrigerating Machine Company?

A. I did not.

80 Q. The contracts as made by you for machinery were submitted to the president of the De La Vergne Refrigerating Machine Company and approved by him before they were made?

A. Never.

81 Q. You communicated the purchase of machines and the prices at which the same were bought to the De La Vergne Refrigerating Machine Company, or its president, did you not?

A. I did present it, not to the De La Vergne Company, to Mr. John De La Vergne, because I had all my communications with him—this contract which I had with Featherstone—telling him that they would not deal with him, they would not touch him—

82 Q. This contract which you offered in evidence, and which was marked New York Exhibit No. 36 is dated August 16th, 1892?

A. Yes.

83 Q. I am referring in my inquiries to purchases of machinery by you of the firm of John Featherstone's Sons, prior to that date, and after the 1st of May, 1891.

A. All machines which I bought of Featherstone during that period you mention, that is, before this contract, I had propositions made by them to me on each and every job, and those propositions I accepted or refused, as the case was. The De La Vergne Company knew the prices I paid to Featherstone for the machines.

84 Q. Or, rather, the prices that you agreed to pay therefor?

A. Agreed to pay, yes.

85 Q. Who paid for those machines?

A. I.

86 Q. By your check?

A. By my check.

87 Q. On your own bank account?

A. Either by my check, or I paid their drafts; they generally drew on me for the amount. The Featherstone Company generally drew on me on the whole amount or such amounts as I authorized them to do.

88 Q. Who furnished the money for such purchases or payments?

A. The De La Vergne Company.

89 Q. Who did the work of piping and erecting such machines?

A. Men I employed.

280 90 Q. Were those men informed of your having employed them as an agent of the De La Vergne Refrigerating Machine Company?

A. I never had occasion to answer such a question, because I was not asked.

91 Q. You made no communication, in other words, of your relations with the De La Vergne Refrigerating Machine Company, because you were not asked?

A. To those men?

92 Q. To those men.

A. Because I was not asked.

93 Q. You left them under the impression that the employment was by yourself as an individual, on your own account?

A. Well, I would not say that I wanted to leave them under the impression that the work was done on my own account; I would not say that. I never had any talk with them; when I needed men, I picked out who I wanted and put them there to work. My foreman brought the pay-roll made up the pay-roll every week, and

I gave him the envelopes, the money, and paid off the men, and I put it on my expense account or my pay-roll account to the De La Vergne Company.

94 Q. The men were paid at the office, 213 East 54th street which was being conducted under your name, were they not?

A. They were generally paid on the jobs—most of them, sent the money there.

95 Q. Those that were paid away from the jobs were paid at the office just mentioned?

A. Yes.

96 Q. The reports of these men were made to you of the progress that was being made on these jobs, and of their wants, of material, were they not?

A. All to me, yes, certainly.

97 Q. Where did you obtain the material that was required to complete those jobs outside of the compressors, or the machines, so called?

A. I bought the materials at Nason Mfg. Co.; coils I bought at the Electric Pipe Ending Company; common pipe I bought of Keating, and so I went into the market. I bought some fittings, which I needed, from the De La Vergne Company; they were charged to me and I paid to them.

98 Q. The purchases of pipe and other things which were not obtained from the De La Vergne Refrigerating Machine Company were made by you in your own name, were they not?

A. Yes, sir, always.

99 Q. And also paid for by your check on your own bank account?

A. Yes, sir.

100 Q. Do you remember how it happened that this contract was made with the De La Vergne Refrigerating Company on the first day of May, 1891, and introduced in evidence as New York Exhibit No. 4, provided that you should faithfully and diligently serve the said De La Vergne Refrigerating Machine Company in its business, or in the business of the Consolidated Ice Machine Company, as you might be directed?

A. I entered into the agreement with the De La Vergne Company mostly for the purpose of selling Consolidated machines, of which they claimed to own the patent, and which I was fully familiar with, and was able to sell in the market. For this reason I entered into such contract with them, but it was stipulated at the same time that I should be,—if I was called off, also obliged to handle and sell the De La Vergne machines.

101 Q. You have not answered my question, and therefore I will put it in another shape.

A. If I did not, then I did not remember it.

102 Q. I wanted to know why this contract contained the stipulation that you were to employ your time in the business of the Consolidated Ice Machine Company, if you were so directed?

A. The closing of that contract was based upon my ability to sell

Consolidated machines; that was the main point, why I was engaged by De La Vergne.

103 Q. The contract of April 16th, 1891, between the De La Vergne Refrigerating Company, and the Consolidated Ice Machine Company had already been entered into, had it not?

A. Yes, sir.

104 Q. According to that contract, the De La Vergne Refrigerating Machine Company had purchased the assets of the Consolidated Ice Machine Company, subject to the rights of its creditors, and the possession of the assignee, had it not?

A. Yes, I remember—I do not remember the exact wording of that contract, but I think that was the digest of it.

105 Q. Who had this contract prepared?

A. This contract between me and De La Vergne?

106 Q. Between you and Mr. De La Vergne?

A. Mr. Fitch.

107 Q. He was the attorney of the De La Vergne Refrigerating Machine Company, was he not?

A. I cannot tell—I know it was De La Vergne's attorneys, because he brought me there.

108 Q. Mr. De La Vergne, the president of the De La Vergne Refrigerating Company brought you to Mr. Fitch?

A. Referred me to Mr. Fitch.

109 Q. Mr. Fitch was not your attorney?

A. No.

110 Q. Who gave Mr. Fitch the facts upon which this contract was drawn?

A. I.

111 Q. Did you not then have inserted "or in the business of the Consolidated Ice Machine Company," because it was the purpose of the De La Vergne Refrigerating Company then possibly to
282 conduct the business of the Consolidated Ice Machine Company after completing the purchase of the assets of the latter company?

A. How can I answer that question? I know the De La Vergne Company intended to go into the building of Consolidated machines—it was their intention to build Consolidated machines later on. It was their intention to handle that machine.

112 Q. That would have been then the business of the De La Vergne Refrigerating Machine Company, would it not?

A. If they had built?

113 Q. Yes.

A. Certainly it would be their business.

114 Q. I ask you why was it inserted in this contract that you were to faithfully and diligently serve the De La Vergne Company in its business, or in the business of the Consolidated Ice Machine Company, as you might be directed?

A. Because I was the only one at that time who could purchase Consolidated ice machines. The Featherstone Company would not deal with the De La Vergne Company, would not sell them any machines, but had no objection to sell me the machines, and let me

do with them what I wanted. That was the main reason that they put that clause in. If they would have manufactured Consolidated machines, perhaps they would not have put in that clause at all.

115 Q. Mr. De La Vergne, the president of the De La Vergne Company then suggested the insertion of this language in that contract, did he?

A. His lawyer did it.

116 Q. When you prepared these advertisements that were published in September and October, 1891, they were submitted to the attorney of the De La Vergne Refrigerating Machine Company?

A. Never. I never had any dealings with the attorney of the company in regard to my advertisements. I did that all myself.

117 Q. Did you not submit a card of yours to Mr. Hubert Banning, the attorney of the De La Vergne Refrigerating Machine Company, for examination and correction, if necessary, about September 15th, 1891, and which is referred to here in a copy of a letter, in a letter book of the De La Vergne Refrigerating Machine Company, written by Mr. Hubert Banning, under date of September 15th, 1891, directed to Hon. A. P. Fitch, Sharon Springs, New York, in this language: "Enclosed please find a card of the Consolidated Ice Machine Company, which Mr. Koenigsberg has just handed to me with the statement that he would like to avail himself of the matter upon this card so far as it may be possible in issuing new cards in connection with his conduct of the business"?

283 A. Well, I may have given him a card, but I do not recollect it.

118 Q. Do you know when the De La Vergne Refrigerating Company, or its president, or Mr. John C. De La Vergne, individually, declined to comply with the contract of April 16th, 1891?

A. If I knew that he declined?

119 Q. I say do you know when that declination was made?

A. No, I don't remember that. I never knew that he made a declination to do it; he never spoke to me about that matter.

120 Q. You recall the fact, do you not, that Mr. Waters under the employ of the De La Vergne Refrigerating Company, attempted to obtain contracts for the purchase of the claims or demands owned by the Consolidated Ice Machine Company—

A. I remember that.

121 Q. You said, I think, that you made no effort to assist Mr. Waters in that business?

A. I did not.

122 Q. Did you fail to render that assistance by direction of Mr. De La Vergne?

A. Mr. De La Vergne never requested me to do it.

123 Q. And, hence, you did not take any part in it?

A. No part at all. I only assisted Mr.—

124 Q. Wait a moment. We will get to that. Mr. De La Vergne knew that you had had the dealings with the persons in the East to whom the Consolidated Ice Machine Company owed, did he not?

A. I suppose he did.

125 Q. He knew that you had been the eastern agent of the Consolidated Ice Machine Company?

A. Oh, certainly, he did that.

126 Q. And you say he did not request you to aid in the matter of obtaining contracts for the purchase of these liabilities of people to whom the Consolidated owed money in the East?

A. No, never did.

127 Q. Do you remember when it was that Mr. Waters attempted to buy these claims or obtained contracts for the purchase of the same? It was in July and August, 1891, and June, was it not?

A. I don't recollect the date, because I was not interested in it.

128 Q. Knight & Botts came on here a number of months thereafter, did they not?

A. Knight & Botts came on here, I think, in the fall of the year.

129 Q. In the fall of 1891?

A. Yes, with Thomas.

130 Q. It was after you had issued these advertisements that they came on?

A. Certainly. 1891. Yes.

131 Q. These gentlemen who came from Chicago, asked the creditors to become parties to a trust agreement which they had drawn up, or to sell their claims at 40 cents on the dollar, did they not?

284 A. I only know that they came here to buy up claims at 40 cents on the dollar.

132 Q. Do you remember any of the literature or writings which they had printed and which were signed by the creditors?

A. No.

133 Q. You won't say that those papers did not contain the option of becoming party to the trust agreement, or selling the claims at 40 cents on the dollar?

A. I do not recollect—

Mr. ALDRICH: It may be so conceded.

A. I recall a certain incident, Mr. Rassieur, with reference to that. I heard from outside parties that such circular was circulated, that is, was shown, but I never had a look at it, and I asked Thomas, "Why don't I know anything about that business." "Well, you are in the employ of De La Vergne" you answered me, and I said, "No, what has it got to do with this. I assist you in every respect I can to get as many signatures and claims as I can," and I put my man Jeans and myself, and I secured about 35, at least 35, of those claims for them, and they sent me checks, and I handled that business for them without asking any compensation, even I paid men, and then after they received my first batch of transfers of claims they sent me a long document prepared by you, which invites for a subscription—I forget now what it was—

134 Q. To a trust agreement?

A. Yes. And that was the first time I ever knew of that. All that time I had done all my work for them.

135 Q. The men who you employed to do the business that was done by you prior to the publication of this circular, and prior to

the publication of the advertisements that have been referred to in this case, were substantially the same men who had been in the employ of the Consolidated Ice Machine Company, as far as erecting engineers and clerks in the office were concerned, were they not?

A. Previous to the issuing of that circular, that is, from the time of the failure of our company to the time of the issuing of that circular, I only had two contracts, one in Philadelphia with Raine, and one in Brooklyn with the India Wharf Brewing Company. Now, those two contracts, one was only machines alone, the Featherstone Company sent a man by the name of McGregory here to erect it, and I put one of my own men by the name of Bailey in as a man to do the pipe fitting around the machine—

136 Q. I am not speaking of those contracts. Those were made by you before the 1st of May, 1891?

A. Yes, sir.

137 Q. Those are the ones you referred to concerning which Mr. De La Vergne's company granted you a release from the payment of royalty?

A. Yes, sir.

285 138 Q. I am speaking of the contracts made by you and under which machinery was erected after the first of May, 1891, and before the publication of your circular and advertisements in September and October, 1891?

A. Between May and September I did not make, did not carry out any contracts at all, because that was not the season.

139 Q. You did not have McDonough & House trying to obtain contracts for you during that period of time, did you?

A. McDonough under no circumstances, because McDonough—

140 Q. How about House?

A. House was in my employ.

141 Q. How about Jenks, the clerk?

A. He was my office man.

142 Q. In your employ?

A. Yes, sir.

143 Q. That is, paid by you in the first instance, and the money for such payments refunded to you by the De La Vergne Refrigerating Machine Company upon your expense account?

A. Yes, sir.

144 Q. How often were those expense accounts rendered?

A. Every week.

145 Q. And how often were the payments made?

A. Every month.

146 Q. Do you know how this expense was entered in the books of the De La Vergne Refrigerating Machine Company?

A. No, never looked at them.

Redirect examination:

1 Q. Mr. Koenigsberg, you first met Mr. Elkins and laid this matter before him in December of 1890, I believe?

A. The last of December I believe it was, the 30th.

2 Q. Was he the first party that you approached?

A. Mr. William J. Elkins?

3 Q. Yes.

A. Yes.

4 Q. I call your attention to your letter addressed to the Penn. iron works, under date of December 30th, from New York, 1890, and ask you to produce it, and also a copy of Mr. Elkins' answer to you under date of January 2nd, 1891?

A. You want the letter.

5 Q. The letter that you wrote under date of December 30th, 1890?

Letter produced and a copy attached and marked New York Exhibit 39.

6 Q. I ask you to produce the answer of Mr. Elkins thereto under date of January 2nd, 1891?

Answer of Mr. Elkins, dated January 2nd, 1891, addressed "Mr. J. Koenigsberg, New York," produced, and marked New York Exhibit No. 40.

286 7 Q. I ask you now for your letter of the 3rd of January, 1891, and answer thereto addressed to William L. Elkins, Jr.?

Letter referred to is produced and marked New York Exhibit 41.

8 Q. Please produce answer of the 4th of January.

Letter produced and marked New York Exhibit 42.

9 Q. I ask you to produce your letter written to Judge Rassieur on that day in German.

Letter produced.

10 Q. I ask you to look at the two contracts which I now hand you, and which have been produced by Judge Rassieur, and state, if you know, who prepared them, and at what time?

A. Mr. Finletter, the lawyer of the Penn. Iron Company, Mr. Elkins and Mr. Maloney brought them over with me from New York, and we went out to look with Mr. Chris, and we went to the Hotel Richelieu and wrote that proposition out.

The contract referred to by the witness in his answer is produced and made a part of the deposition, marked New York Exhibit 43.

11 Q. What is this second contract which Judge Rassieur has produced?

DEF'T'S COUNSEL: I desire to have it shown on the record that both of these papers are blank forms of contract.

A. That contract was wrote out at the office at 213 East 54th street, and I think it was prepared by you to submit it to them, as far as I remember. It was—

Contract handed to stenographer, and marked New York Exhibit No. 44.

A. (continued). I have a recollection that this Exhibit 45 was written in my office, 213 East 54th street, on my typewriter and left with me by Mr. Rassieur. After I read it I might find more. I think, Mr. Rassieur, that is the draft that we talked over, and which you left in my office, as far as I remember.

12 Q. Is that the draft you had before you at the time you terminated negotiations with Mr. Elkins on the 11th day of March, 1891?

A. Yes, sir; that was. After he saw that we concluded it was all over with him. He did not want to touch it.

13 Q. You have spoken, Mr. Koenigsberg, about the value of the good will of the plant. This good will was not obtainable unless one was ready to pay the debts of this corporation, was it? It had gone to the assignee, had it not, if you know?

287 Judge RASSIEUR: It is conceded that it had gone to the assignee, subject to the rights of creditors, but subject to the Illinois law.

A. I remember he would not consider any proposition to sell the good will without being subject to the liabilities of the concern; the most of them, De La Vergne as well as the other fellows, Elkins, wanted to divide that. We left the thing with the assignee to pay the creditors, and we will take the balance; that is, we won't have anything to do with guaranteeing creditors; let the assignee wind that up, and take the good will and go on with the business. I would not listen to anything of the kind.

14 Q. So that you understood it took a good deal of money to get this good will, pay the creditors?

A. No, my idea of claiming that the good will was worth anything was based on the knowledge what it had cost, the expense we had to build up that business. For that reason the good will was worth considerable, because we paid it out of our pockets; the companies never disbursed any dividends, we simply drew very little salary, and let our accumulations go on, and for that reason I say the good will—

15 Q. You never knew of a good will of an ice machine company situated as this was, being sold, did you?

A. Never.

16 Q. You do not base your estimate of value on the sales of a like article?

A. No, I never heard of any good will of any ice machine company being sold.

17 Q. In ice-machine plants it is of the greatest importance, as I understand, Mr. Koenigsberg, that the operation of the plant shall be continuous, and not be discontinued by the breakage or cessation?

A. Certainly, most important thing.

18 Q. Thereby property of great value would be destroyed if the refrigeration was discontinued immediately?

A. Certainly it might; the temperature may rise in your rooms where you have perishable goods and may spoil them.

19 Q. And that is the peculiar advantage of the Boyle patent, it permits of quick repairs in the valves of the compressor?

A. Yes, sir.

20 Q. And when you consider the incidentals, the situation and repair before there can be any change of temperature, it makes that consideration (—) most important one?

A. Very important one.

21 Q. After the De La Vergne Company was adjudged by the Supreme Court of the United States to be the owner of this patent, it was a valuable acquisition for the De La Vergne Company?

288 A. In fact, it was such a valuable acquisition that I asked to take hold of that machine with this protection.

22 Q. And as I understand you in your direct examination, you held that out to customers to enable you to make sales?

A. Certainly, that is the most important thing. I told them "If you buy a machine from me you are sure of no patent litigations because the patent belongs to the De La Vergne Company." I had that printed on my cards too.

23 Q. And the Consolidated Company, prior to its failure, held it out the same way, had it not, the value of this patent?

A. Well, I don't think it was necessary that time to mention the patent, because nobody—

24 Q. The litigation had been up, decided?

A. Nobody knew anything else that we did not own the patent.

25 Q. You claimed to own it at that time?

A. Well, the world knew the trade knew it, that our Consolidated machines is covered by patents, and we owned all those patents.

26 Q. But my question is whether the Consolidated Company used its ownership of this patent as a means of effecting sales of its plants.

A. I never did it.

27 Q. The plant of Schmitt & Schwanenfluegel was after the failure?

A. After the failure.

28 Q. That plant was erected by you on your own account?

A. It was erected by me on my own account, but I had a partner in it.

29 Q. Judge Rassieur was your partner in that, was he not?

A. Well, he helped me; he provided the money for that plant.

30 Q. About what date was that erected?

A. It was erected—well, it was finished in the spring of the year.

31 Q. 1891?

A. 1891, as far as I can recollect.

32 Q. You have spoken of the value of patterns. Is it not a fact that after patterns have been used four or five times that they become pretty nearly valueless, and have to be remade?

A. Have to be repaired, fixed over, not entirely valueless.

33 Q. They incidentally depreciate?

A. Certainly.

34 Q. And in taking any proper inventory of the value of the

assets, a large percentage is charged each year against the pattern-for depreciation?

A. Certainly they depreciate.

35 Q. So that what the patterns had cost you would not be at all a fair index of their then actual cash value, would it?

A. No.

36 Q. The patterns stood on your books, I believe, at \$15,000, did they not?

A. I cannot recollect.

289 Recross-examination :

1 Q. The contract that you have referred to with Schmitt & Schwanenfluegel was one which was made because the Consolidated Ice Machine Company and its sureties had bound to furnish them the second machine at a price stated in the contract?

A. Yes, sir.

2 Q. I was on that bond, was I not?

A. Yes, sir.

3 Q. They called off the completion of that contract early in 1891?

A. It was '90, during the time you was here, you remember?

4 Q. Before 1890—

A. In October.

5 Q. Now, it was early in 1891, was it not?

A. I think it was late in November.

6 Q. Or in November, 1890?

A. Yes, because you left the East, delayed a year, and came back again in March.

7 Q. That contract I refused to make, did I not, and did I not also say that I would be willing to furnish a bond for Theodore Buder, a nephew of mine, who had been a constructing engineer for the Consolidated Ice Machine Company?

A. You furnished a bond, you signed that bond.

8 Q. I say I was ready to sign a bond for that nephew; I mean to build that machine.

A. To erect that machine, but I don't know if that thing came up—

9 Q. Wasn't that machine furnished by Mr. Buder under that contract made in November, 1890, or shortly thereafter?

A. What do you mean?

10 Q. He contracted and furnished it, got it from the assignee and furnished it to Schmitt & Schwanenfluegel, and erected it himself as you remember.

A. I know he erected it, but the contract was made between Schmitt & Schwanenfluegel and me, and the contract was transferred by you going the bond, and we having our special understanding that Mr. Buder should erect it.

11 Q. Were the plants of the Consolidated Ice Machine Company any more defective than those plants ordinarily were immediately upon their erection when erected by the De La Vergue Refrigerating

Company or any other refrigerating ice machine company in the country?

A. Certainly not.

12 Q. I want to be sure about your answer; I think it is all right, but I am not clear about it. The Consolidated Ice Machine Company never advertised the Boyle patent particularly as their patent, or that their machine was constructed under that patent, did it?

290 A. I was not asked that question. The question was if the Consolidated sold machines claiming that they owned the Boyle patent. I say I never did sell any under those circumstances.

13 Q. My question is, Did they advertise to the world that they were the owners of the Boyle patent, or building their machines under the Boyle patent?

A. Not that I know of.

It is consented that the signature of the witness be waived.

I, Alexander Cameron, Jr., a notary public in and for the city and county of New York do hereby certify that all the proceedings aforesaid were had, as stated in the causes named in the caption hereto.

That on the 10th day of November, 1896, and the subsequent days mentioned in the foregoing depositions I was attended by Leo Rassieur, Esq., counsel for the plaintiffs in said actions, and by Charles H. Aldrich, Esq., and Hubert A. Banning, Esq., counsel for the defendant, The De La Vergne Refrigerating Machine Company and by the witnesses Adolf Bender, Louis E. De La Vergue, Louis Baron, Charles H. Cone and Joseph Koenigsberg at the times and as stated in said depositions.

That before giving their depositions the said witnesses were by me severally sworn to testify the truth, the whole truth and nothing but the truth in said actions and that their depositions were taken down by a stenographer in the presence of the said witnesses and from their statements respectively, and typewritten from the stenographer's notes thereof, of which the foregoing is a transcript. And that the signatures of the said several witnesses to their respective depositions were waived by counsel as noted at the end of each deposition.

That the various exhibits referred to in said depositions were offered in evidence as therein stated and marked by me with my signature thereto as appears on the originals thereof, copies of which are hereto annexed.

I further certify that the reason for taking the foregoing depositions is that the witnesses are material and necessary in the actions in the caption of the said depositions named and that they live at a greater distance than one hundred miles from the place of trial of the above-entitled actions.

That I am not related to, or of counsel for either of said parties, or in any way interested in the result of said suits.

In testimony whereof, I have hereunto set my hand and affixed my notarial seal this 16th day of November, 1896.

[SEAL.] (Signed) ALEX. CAMERON, JR.,
Notary Public in and for the City and
County of New York, No. 118.

291

Form 1. Copy.

STATE OF NEW YORK, }
City and County of New York, } ss :

I, Henry D. Purroy, clerk of the city and county of New York, and also clerk of the supreme court for the said city and county, the same being a court of record, do hereby certify, that Alex. Cameron, Jr., whose name is subscribed to the certificate of the proof or acknowledgment of the annexed instrument, and thereon written, was, at the time of taking such proof or acknowledgment, a notary public in and for the city and county of New York, dwelling in the said city, commissioned and sworn, and duly authorized to take the same. And further, that I am well acquainted with the handwriting of such notary, and verily believe that the signature to the said certificate of proof or acknowledgment is genuine.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said court and county, the 16th day of Nov., 1896.
[SEAL.] (Signed) HENRY D. PURROY, Clerk.

Copy of Minutes of Trustees, 1891.

Alex. Cameron, Jr., N. P.

NEW YORK, January 5, 1891.

The regular monthly meeting of the trustees of the De La Vergne Refrigerating Machine Co. was held at its office, foot of East 138th St., N. Y., on Monday, January 5, 1891, at four o'clock p. m.

Present: Louis E. De La Vergne, John C. De La Vergne and Charles H. Cone.

The meeting was called to order by the president, Mr. John C. De La Vergne. On motion of Mr. L. E. De La Vergne, seconded by Mr. C. H. Cone, the meeting was adjourned until Tuesday, January 13, 1891, at 10 o'clock a. m.

(Signed)

CHARLES H. CONE, Sec'y.

NEW YORK, January 13, 1891.

The regular monthly meeting of the trustees of the De La Vergne Refrigerating Machine Co., postponed from January 5, 1891, was held at the office of the company, foot of East 138th street, N. Y. city, on Tuesday, January 13, 1891, at 10 o'clock a. m.

Present: Louis E. De La Vergne, Louis Block and Charles H. Cone.

Mr. Louis E. De La Vergne, the vice-president, called the meeting to order.

Approved Jan'y 23, 1891.

292 On motion of Mr. Louis Block, the minutes of the previous meetings from January 6, '91, to date were read and approved.

The treasurer *pro tem.* presented his reports showing the liabilities of the company as they existed on the following dates, viz: Nov. 30, '89, Dec. 30, '89, Jan'y 31, '90, Feb'y 28, '90, March 31, '90, April 30, '90, May 31, '90, June 30, '90, Aug. 31, '90, Sept. 30, '90, Oct. 31, '90, Nov. 30, '90.

On motion of Mr. Louis Block, seconded by Mr. Ch. H. Cone, it was voted: That the reports of the treasurer *pro tem.*, as just read, be spread upon the minutes of the meeting and stand approved.

They are as follows:

November 30, 1889:

Liabilities for open accounts as per our trial balance..	109,959.43
Do. for dividend ac.....	7,592.23
Do. for machines ordered to date.....	167,580.00
Do. for loan ac. mortg. 138'' St.....	200,000.00
Do. for bills payable.....	281,786.76
Total.....	766,918.42

December 31, 1889:

Liability for open accounts as per our trial balance.....	123,848.32
Liability for dividend ac.....	7,592.23
Do. machines ordered to date.....	160,180.00
Do. for bills payable.....	293,615.69
Do. for loan ac. mortg. 138'' St.....	200,000.00
	785,236.24

January 31, 1890:

Liability for open accounts as per our trial balance.....	160,283.94
Liability for dividend ac.....	7,666.61
Do. machines ordered to date.....	152,600.00
Do. bills payable.....	345,562.81
Do. loan ac. mortg. 138'' St.....	200,000.00
	866,113.36

February 28, 1890:

Liabilities for open accounts as per our trial balance..	204,116.72
Do. for dividend ac.....	7,666.61
Do. machines ordered to date.....	151,240.00
Do. for bills payable.....	364,318.13
Do. for loan ac. mortg. 138'' St.....	200,000.00
	927,341.46

Approved Jan'y 23, 1891.

March 31, 1890:

Liabilities for open accounts as per our trial balance..	198,054.67
Do. for dividend ac.....	7,666.61
Do. for machines ordered to date.....	137,950.00
Liabilities for bills payable.....	461,367.20
Do. for loan ac. mortg. 138'' St.....	200,000.00
	<hr/>
	1,005,038.48

April 30, 1890:

Liabilities for open accounts as per trial balance.....	278,837.88
Do. for dividend ac.....	7,666.61
Do. for machines ordered to date.....	95,800.00
Do. for bills payable.....	461,536.18
Do. for loan ac. mortg. 138'' St.....	200,000.00
	<hr/>
	1,043,840.67

293

May 31, 1890:

Liabilities for open accounts as per trial balance..	250,811.76
Do. dividend ac.....	7,666.61
Do. for machines ordered to date.....	86,950.00
Do. for bills payable.....	488,547.66
Do. for loan ac. mortg. 138'' St.....	200,000.00
	<hr/>
	1,028,976.03

June 30, 1890:

Liabilities for open accounts as per trial balance..	283,295.78
Do. for dividend ac.....	7,460.23
Do. for machines ordered to date.....	82,950.00
Do. for bills payable.....	524,007.75
Do. loan ac. mortg. 138'' St.....	200,000.00
	<hr/>
	1,097,713.76

August 31, 1890:

Liabilities for open accounts as per trial balance.	160,596.37
Do. for dividend ac....	7,460.23
Do. machines ordered to date....	44,500.00
Do. for bills payable...	524,505.72
Do. for loan ac. mortg. 138'' St.....	200,000.00
	<hr/>
	937,062.32

July and Aug. trial
balance together. No
trial bal. July.

September 30, 1890:

Liabilities for open account as per trial balance.....	210,062.67
Do. for dividend ac.....	7,460.23
Do. for machines ordered to date.....	56,200.00
Do. for bills payable.....	505,946.47
Do. for loan ac. mortg. 138'' St.....	200,000.00
	<hr/>
	979,669.37

October 31, 1890:

Liabilities for open account as per trial balance..	281,983.94
Do. for dividend ac.....	7,460.23
Do. for machines ordered to date.....	51,600.00
Do. for bills payable.....	447,547.54
Do. for loan ac. mortg. 138'' St.....	200,000.00
	<hr/>
	988,591.71

November 30, 1890:

Liabilities for open account as per trial balance..	228,235.87
Do. for dividend ac.....	7,460.23
Do. for machines ordered to date.....	42,900.00
Do. for bills payable....	404,378.97
Do. for loan ac. mortg. 138'' St.....	200,000.00
	<hr/>
	882,975.07

On motion of Mr. Charles H. Cone, seconded by Mr. Louis Block, the meeting was adjourned.

(Signed)

CHARLES H. CONE, *Sec'ty.*NEW YORK, *January 17, 1891.*

A special meeting of the trustees of the De La Vergne Refrigerating Machine Company, was held pursuant to notice of same, at its office, foot of East 138th street, New York city, on Saturday, January 17, 1891, at ten o'clock a. m.

Present: Louis E. De La Vergne, Louis Block, and Charles H. Cone.

Mr. Louis E. De La Vergne, vice-president, presided.

294 On motion of Mr. Louis Block, seconded by Mr. Charles H. Cone, the reading of the minutes of previous meeting was dispensed with.

Mr. Charles H. Cone then offered the following resolution, which was adopted, viz:

Whereas, it is necessary for the president of this company to sign the company's annual report of January 2, 1891, before the publication of same, and

Whereas, the publication of same has to be made by January 20, 1891, according to law, and

Whereas, the president, Mr. John C. De La Vergne, is now absent in the West, and it is therefore not possible for him to sign the above-mentioned report, and

Whereas, article 4, section 1, of the by-laws of this company provide that in the absence of the president, the vice-president shall have such special powers as shall be given him by a vote of a majority of the trustees, therefore

Resolved, That the vice-president, Mr. Louis E. De La Vergne, be, and he hereby is, empowered to sign the above-mentioned annual report of this company of January 2, 1891, for the purpose above specified. Adopted.

Approved Jan'y 23, 1891.

Approved Jan'y 23, 1891.

On motion of Mr. Charles H. Cone, seconded by Mr. Louis Block, the meeting was adjourned.

(Signed)

CHARLES H. CONE, *Sec'y.*

NEW YORK, *January 23, 1891.*

A meeting of the board of trustees of the De La Vergne Refrigerating Machine Company was held at its office, foot of East 138th street, N. Y. city, on Friday, January 23, 1891, at three o'clock p. m.

Present: Mess. John C. De La Vergne, Louis Block, Louis E. De La Vergne and Charles H. Cone.

The president, Mr. John C. De La Vergne, took the chair and called the meeting to order. The minutes of the previous meetings held January 5th, 13th, and 17th, '91, were read and approved as read.

On motion of Mr. Louis Block, seconded by Mr. Charles H. Cone, it was

Voted, that Mr. John C. De La Vergne be, and he hereby is, elected president of the company for the year 1891, or until his successor be elected.

295 On motion of Mr. Louis Block, seconded by Mr. Charles H. Cone, it was

Voted, that Mr. Louis E. De La Vergne be, and he hereby is elected vice-president of the company for the year 1891, or until his successor be elected.

On motion of Mr. Louis Block, seconded by Mr. Charles H. Cone, it was

Voted, that Mr. Louis E. De La Vergne be, and he hereby is, elected treasurer of the company for the year 1891, or until his successor be elected.

On motion of Mr. Louis Block, seconded by Mr. John C. De La Vergne, it was

Voted, that Mr. Charles H. Cone be, and he hereby is, elected secretary of the company for the year 1891, or until his successor be elected.

On motion of Mr. Louis E. De La Vergne, seconded by Mr. Charles H. Cone, the meeting was adjourned.

(Signed)

CHARLES H. CONE, *Sec'y.*

NEW YORK, *February 2, 1891.*

The regular monthly meeting of the trustees of the De La Vergne Refrigerating Machine Co. was held at its office, foot of East 138th street, N. Y. city, on Monday, Feb'y 2, 1891, at four o'clock p. m.

Present: Louis E. De La Vergne and Charles H. Cone.

A quorum not being present, the meeting was adjourned.

(Signed)

CHARLES H. CONE, *Sec'y.*

Approved March 2, 1891.

Approved March 2, 1891.

Approved March 2, 1891.

NEW YORK, *March 2, 1891.*

The regular monthly meeting of the trustees of the De La Vergne Refrigerating Machine Co. was held at its office foot of East 138th street, N. Y. city, on Monday, March 2nd, 1891, at 4 o'clock p. m.

Present: Louis E. De La Vergne, Louis Block and Charles H. Cone.

Louis E. De La Vergne, vice-president, took the chair and called the meeting to order.

The minutes of the meeting held January 23, 1891, and Feb'y 2, 1891, were read and approved as read.

The secretary proceeded to read the report of the treasurer for the month of December, 1890, and January, 1891, showing the liabilities of the company.

On motion of Mr. Louis Block, seconded by Mr. C. H. Cone, it was voted: That the reports of the treasurer for the months of December, 1890, and January, 1891, be spread upon the minutes and stand approved.

296 They are as follows:

December 31, 1890:

Liabilities on open account as per trial balance....	231,209.31
Do. on bills payable, as per trial balance ...	452,304.69
Do. on dividend ac. as per trial balance.....	7,460.23
Do. on loan ac. (mortgage) as per trial balance.	200,000.00
Do. on machines ordered to date.....	92,250.00

Total liabilities Dec. 31, 1890..... 983,224.23

January 31, 1891:

Liabilities on open account as per T. B.....	283,521.10
Do. bills payable as per T. B.....	463,641.19
Do. loan ac. (mortgage) as per T. B.....	200,000.00
Do. on dividend ac. as per T. B.....	7,412.23

Total liabilities Jan'y 31, '91..... 954,547.52

On motion of Mr. C. H. Cone, seconded by Mr. Louis Block, the meeting adjourned.

(Signed)

CHARLES H. CONE, *Sec'y.*

NEW YORK, *March 6th, 1891.*

A special meeting of the trustees of the De La Vergne Refrigerating Machine Co. was held pursuant to notice of same, at its office, foot of East 138th street, N. Y. city, on Friday, March 6, 1891, at eleven o'clock a. m.

Present: Louis E. De La Vergne, Louis Block and Charles H. Cone.

Mr. Louis E. De La Vergne, vice-president, presided.

On motion of Mr. Block, seconded by Mr. Cone, the reading of the minutes of previous meetings was dispensed with.

Mr. C. H. Cone then offered the following resolution, which was adopted, as viz:

Approved Jan'y 4, '92.

Approved Jan'y 4, '92.

Approved Jan'y 4, '92.

Whereas, the president of this company, Mr. John C. De La Vergne, is now absent in the West, and

Whereas, it has become necessary in order to meet the demands of the business before his return, to offer for discount certain promissory notes held by, or to be received by, the De La Vergne Refrigerating Machine Co., and

Whereas, article IV, section 1, of the by-laws of the De La Vergne Refrigerating Machine Co. provide, that in the absence of the president, the vice-president shall have such special powers as shall (—) given him by a vote of the majority of the trustees, therefore,

Resolved, That the vice-president, Mr. Louis E. De La Vergne, be, and he hereby is, empowered to indorse such promissory notes in the name of the De La Vergne Refrigerating Machine Co., for the purpose of discount of same, as may be necessary to meet the demands of the business until such time as the president, Mr. John C. De La Vergne, returns from the West. Adopted.

On motion of Louis Block, seconded by Chas. H. Cone, the meeting was adjourned.

(Signed)

CHARLES H. CONE, *Sec'y.*

NEW YORK, April 6, 1891.

The regular monthly meeting of the trustees of the De La Vergne Refrigerating Machine Co. was held at its office, foot of East 138th street, New York city, on Monday, April 6, 1891, at four o'clock p. m.

Present: Louis E. De La Vergne and Charles H. Cone.

A quorum not being present, the meeting was adjourned.

(Signed)

CHARLES H. CONE, *Sec'y.*

NEW YORK, May 4, 1891.

The regular monthly meeting of the trustees of the De La Vergne Refrigerating Machine Co. was held at its office foot of East 138th street, N. Y. city, on Monday, May 4, 1891, at four o'clock p. m.

Present: Louis E. De La Vergne and Charles H. Cone.

A quorum not being present, the meeting was adjourned.

(Signed)

CHARLES H. CONE, *Sec'y.*

NEW YORK, May 13th, 1891.

A special meeting of the trustees of the De La Vergne Refrigerating Machine Co. was held at its office, foot of East 138th street, N. Y. city, Wednesday, May 13th, 1891, at ten o'clock a. m., pursuant to notice, as follows:

NEW YORK, May 11th, 1891.

A special meeting of the board of trustees of the De La Vergne Refrigerating Machine Co. will be held at its office, foot of East 138th street, N. Y. city, on Wednesday, May 13th, 1891, at 10 o'clock a. m. for the purpose of further considering the matter of the in-

Approved Jan'y 4, '92.

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Approved Jan'y 4, '92.

crease of the capital stock and the declaring of a dividend; also such other business as may come before it.

(Signed) THE DE LA VERGNE REFRIGERATING
MACHINE CO.

CHARLES H. CONE, *Sec't'y.*

LOUIS E. DE LA VERGNE, *Vice-Pres't.*

Approved Jan'y 4, '92.

Present: Mr. John C. De La Vergne, Mr. Louis E. De La Vergne and Mr. Charles H. Cone.

The meeting was called to order by the president, Mr. John C. De La Vergne.

On motion of Louis E. De La Vergne, seconded by Charles H. Cone, it was

Voted, That a dividend of three hundred per cent. (300%) be declared by the De La Vergne Refrigerating Machine Co., to be paid at such times as are convenient in connection with the business of the company.

298 On motion of Louis E. De La Vergne, seconded by Charles H. Cone, it was

Voted, That in addition to the dividend already voted, that there be paid to the stockholders a dividend of six per cent. (6%) on the present stock of the company, to wit: three hundred and fifty thousand dollars (350,000) to be paid at such times as are convenient in connection with the business of the company.

On motion of Louis E. De La Vergne, seconded by Charles H. Cone, the meeting was adjourned.

(Signed)

CHARLES H. CONE, *Sec't'y.*

NEW YORK, *June 1, 1891.*

Approved Jan'y 4, '92.

The regular monthly meeting of the trustees of the De La Vergne Refrigerating Machine Co. was held at its office, foot of East 138th street, N. Y. city, on Monday, June 1, 1891, at four o'clock p. m.

Present: Louis E. De La Vergne and Charles H. Cone.

A quorum not being present, the meeting was adjourned.

(Signed)

CHARLES H. CONE, *Sec't'y.*

NEW YORK, *July 6, 1891.*

Approved Jan'y 4, '92.

The regular monthly meeting of the trustees of the De La Vergne Refrigerating Machine Co. was held at its office, foot of East 138th street, N. Y. city, on Monday, July 6, 1891, at four o'clock p. m.

Present: Louis E. De La Vergne and Charles H. Cone.

A quorum not being present, the meeting was adjourned.

(Signed)

CHARLES H. CONE, *Sec't'y.*

NEW YORK, August 3, 1891.

Approved Jan'y
4, '92.

The regular monthly meeting of the trustees of the De La Vergne Refrigerating Machine Co. was held at its office foot of East 138th street, N. Y. city, on Monday, August 3rd, 1891, at four o'clock p. m.

Present: Louis E. De La Vergne and Charles H. Cone.

A quorum not being present, the meeting was adjourned.

(Signed)

CHARLES H. CONE, *Sec'y.*

NEW YORK, September 7, 1891.

Approved Jan'y
4, 1892.

The regular monthly meeting of the trustees of the De La Vergne Refrigerating Machine Co. was held at its office foot of East 138th street, N. Y. city, on Monday, September 7, 1891, at four o'clock p. m.

Present: Louis E. De La Vergne and Chas. H. Cone.

A quorum not being present, the meeting was adjourned.

(Signed)

CHARLES H. CONE, *Sec'y.*

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NEW YORK, October 5, 1891.

Approved Jan'y
4, 1892.

The regular monthly meeting of the trustees of the De La Vergne Refrigerating Machine Co. was held at its office foot of East 138th street, N. Y. city, on Monday, October 5, 1891, at four o'clock p. m.

Present: Louis E. De La Vergne and Charles H. Cone.

A quorum not being present, the meeting was adjourned.

(Signed)

CHARLES H. CONE, *Sec'y.*

NEW YORK, December 7, 1891.

Approved Jan'y
4, '92.

The regular monthly meeting of the trustees of the De La Vergne Refrigerating Machine Co. was held at its office, foot of East 138th street, New York city, on Monday, December 7, 1891, at four o'clock p. m.

Present: Louis E. De La Vergne.

A quorum not being present, the meeting was adjourned.

(Signed)

CHARLES H. CONE, *Sec'y.*

N. Y. EXHIBIT 1. Nov. 10, '96. Alexander Cameron, Jr., N. P.

78.

The Brewers' Journal.

Oct., '91.

Office of J. Koenigsberg, 213 E. 54th street.

NEW YORK, September 16th, 1891.

I take pleasure in announcing to the public, and particularly to my patrons who were customers of the Consolidated Ice Machine Company during the (long) period of my connection with that company, that I have recently made arrangements so as to serve them in the future. The De La Vergne Refrigerating Machine Company has for some time past been the owner of letters patent No. 175,020, which was granted to James Boyle, March 21st, 1876, for gas com-

pressors. This patent covers the style compressor used on the machine which I have heretofore been engaged in selling. Having severed my connections with the Consolidated Ice Machine Company which made an assignment October 14th, 1890, I have now arranged with the De La Vergne Refrigerating Machine Company to build refrigerating and ice-making machines under the letters patent referred to, and to furnish the same to such of my old patrons and to new customers as may desire to purchase them.

Trusting that you may favor me in future with your orders, I am,

Your obedient servant,

J. KOENIGSBERG.

An illustrated advertisement of the refrigerating and ice-making machines supplied by J. Koenigsberg, 213 East 54th street, New York, will appear in succeeding issues of the *Brewers' Journal*.

300 N. Y. EXHIBIT 2. Nov. 10, '96. Alexander Cameron, Jr., N. P.

STATE OF NEW YORK, } ss:
City and County of New York, }

We, John C. De La Vergne, William M. Mixer, Josiah H. Macy, Stephen F. Byrnes and Julius J. Suckert do, by these presents, pursuant to and in conformity with the act of the legislature of the State of New York, passed on the seventeenth day of February, one thousand eight hundred and forty-eight, entitled "An act to authorize the formation of corporations for manufacturing, mining, mechanical or chemical purposes," and the several acts of the said legislature amendatory thereof, associate ourselves together and form a company under the name and style of the De La Vergne and Mixer Refrigerating Company and the following are hereby declared to be:

The corporate name of the said company.

The objects for which the company is formed.

The amount of the capital stock of the said company.

The number of shares of which the said capital stock of the company shall consist.

The term of existence of the company.

The number of trustees and their names.

The names of those who shall manage the concerns of the said company for the first year.

The names of the town and county in which the operations of the said company are to be carried on.

1. The corporate name of the said company is hereby declared to be the De La Vergne and Mixer Refrigerating Company.

2. The objects for which the company is formed are as follows:

To manufacture, sell, and put in operation machinery and apparatus for cooling beer and other substances; for making ice, and for other refrigerating purposes.

3. The capital stock of the said company shall be three hundred

and fifty thousand dollars, which shall be divided into thirty-five hundred shares of one hundred dollars each.

4. The said company shall commence on the third day of January in the year one thousand eight hundred and eighty-one and shall continue in existence for the term of fifty years.

5. The number of trustees shall be five.

Their names are: John C. De La Vergne, William M. Mixer, Josiah H. Macy, Stephen F. Byrnes and Julius J. Suckert.

301 The names of those who shall manage the concerns of the said company for the first year are:

John C. De La Vergne, William M. Mixer, Josiah H. Macy, Stephen F. Byrnes and Julius J. Suckert.

6. The name of the town and county in which the operations of the said company are to be carried on is the city and county of New York where the principal office of said company shall be situated but the machines and apparatus made by the company may and will be sold in other States.

Witness our hands and seals, this twenty-seventh day of December, 1880.

JOHN C. DE LA VERGNE.	[SEAL.]
WILLIAM M. MIXER.	[SEAL.]
JOSIAH H. MACY.	[SEAL.]
STEPHEN F. BYRNES.	[SEAL.]
JULIUS J. SUCKERT.	[SEAL.]

STATE OF NEW YORK, }
City of and County of New York, } ss:

On the twenty-seventh day of December in the year one thousand eight hundred and eighty before me personally came John C. De La Vergne, William M. Mixer, Josiah H. Macy, Stephen F. Byrnes and Julius J. Suckert to me known to be the individuals described in, and who executed the foregoing instrument and severally acknowledged that they executed the same.

E. K. VAN BEUREN,
Notary Public, Kings Co.

Cert. filed N. Y. Co.

Indorsed: Certificate of incorporation of the De La Vergne and Mixer Refrigerating Company. State of New York, office of secretary of state. Filed Dec. 29, 1880. Anson S. Wood, deputy secretary of state.

STATE OF NEW YORK, }
City and County of New York, } ss:

I, Willam A. Butler, clerk of the city and county of New York, and also clerk of the supreme court for the said city and county, being a court of record, do hereby certify, that E. K. Van Beuren has filed in the clerk's office of the county of New York, a certified copy of his appointment as notary public for the county of Kings with his autograph signature, and was, at the time of taking the

annexed deposition, duly authorized to take the same, and that I am well acquainted with the handwriting of said notary public, and verily believe that the signature to the annexed certificate is genuine.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court and county, the 27 day of Dec., 1890.

[SEAL.]

WM. A. BUTLER, *Clerk.*

302 STATE OF NEW YORK, }
Office of the Secretary of State, }^{ss}:

I have compared the preceding with the original certificate of incorporation of the De La Vergne and Mixer Refrigerating Company, filed in this office on the 29th day of December, 1880, and do hereby certify the same to be a correct transcript therefrom and of the whole of said original.

Witness my hand and the seal of office of the secretary of state, at the city of Albany, this ninth day of January, one thousand eight hundred and ninety-six.

[SEAL.]

ANDREW DAVIDSON,
Deputy Secretary of State.

N. Y. EXHIBIT 3. Nov. 10, '96. Alex. Cameron, Jr., N. P.

This agreement made and entered into by and between the De La Vergne Refrigerating Machine Company, a corporation organized and doing business under the laws of the State of New York, and Joseph Koenigsberg, of the city, county and State of New York, witnesseth:

Whereas, a certain agreement, bearing date May 1st, 1891, has been existing between said parties relative to the sale of ice and refrigerating machines and plants, of what is known as the Consolidated pattern, by which said company assumed the responsibility of the contracts taken by said Joseph Koenigsberg.

And whereas, it is desired that said original agreement of May 1st, 1891, be abrogated, cancelled and annulled, except in so far as matters thereunder may not be yet settled up between said Joseph Koenigsberg and said company, for which purposes the said agreement is in force, but not otherwise,

Now therefore, the parties hereto have agreed to and with each other that the said agreement of May 1st, 1891, shall be and is hereby terminated, except in so far as the same may involve matters incomplete or unsettled, which are hereafter to be disposed of and settled according to the terms of said agreement.

Second. That said Koenigsberg is hereafter to sell Consolidated refrigerating and ice-making machines and plants, and all appliances, connections and attachments to be used therewith or forming a part of the plants for refrigerating and ice-making purposes, including piping, etc.

303 Third. Said Koenigsberg is to purchase from the said The De La Vergne Refrigerating Machine Company such ma-

chines, or parts of machines and plants as he may hereafter desire, and make contracts for them with said company at prices to be agreed upon, but he is to be privileged to make contracts elsewhere if more advantageous to him.

Fourth. The De La Vergne Refrigerating Machine Company is no longer to indorse the contracts taken by said Koenigsberg, nor to be in any manner responsible for carrying the same into effect, nor for collecting moneys due thereon, nor for damages arising from failures to complete said contracts, and otherwise, and in fact, is to take no responsibility whatever in connection therewith.

Fifth. The De La Vergne Refrigerating Machine Company further agrees to pay to the said Joseph Koenigsberg a salary of four thousand dollars (\$4,000) per year for the period of one year from this date in equal monthly installments and in addition to said salary to pay the office expenses of said Koenigsberg, including a book-keeper, and such other incidental expenses as may pertain thereto, not exceeding eight thousand dollars (\$8,000) for the said period of one year, and the said company is to have the full and entire control of the book-keeper in said Koenigsberg's office and of the matters pertaining thereto which are at all times to be accessible to said company or its authorized representatives.

Sixth. The said Joseph Koenigsberg is to guarantee the said company by his bond in the sum of twenty-four thousand dollars (\$24,000), that the profits of his business for the said period of one year shall be double the expenses of his office and salary as hereinbefore provided, and all the said profits of the said business for said period shall be turned over to the said company as belonging to it as compensation for assuming his salary and the responsibility of his office expenses as aforesaid.

Seventh. In case the profits should amount to more than twenty-four thousand dollars (\$24,000) per annum, the salary of said Koenigsberg shall be one thousand dollars (\$1,000) more per annum, viz., \$5,000. The moneys collected by said Koenigsberg in excess of his necessary payments in carrying on the business shall be paid over to the De La Vergne Refrigerating Machine Company as collected.

Eighth. This agreement shall commence as of the first day of November, 1892, and end on the first day of November, 1893, and may be extended at the option of the De La Vergne Refrigerating Machine Company for the term of six (6) months from said first day of November, 1893.

In witness whereof, the said company has caused these presents to be made, in its name, by its president, and with its corporate seal hereunto affixed, and the said Joseph Koenigsberg has hereunto set his hand and seal, all of which is done in duplicate at the city of New York, this first day of Nov. (1st), 1892.

THE DE LA VERGNE REFRIGERATING
MACHINE COMPANY,

By JOHN C. DE LA VERGNE, *Pres't.*
JOSEPH KOENIGSBERG.

[SEAL.]

N. Y. EXHIBIT 4. Nov. 10, '96. Alex. Cameron, Jr., N. P.

This agreement, made and entered into this first day of May, 1891, between the De La Vergne Refrigerating Machine Company, a corporation organized and doing business under the laws of the State of New York, party of the first part, and Joseph Koenigsberg, of the said city of New York, party of the second part, witnesseth:

First. That the said party of the second part has agreed and hereby does agree faithfully and diligently to serve the said The De La Vergne Refrigerating Machine Company in its business, or in the business of the Consolidated Ice Machine Company, as he may be directed, for the period of three years from and after the first day of May, 1891, for the sum of four thousand (4,000) dollars per year, to be paid to the said party of the second part monthly, on or before the last day of each month.

And said party of the second part has further agreed that he will give his entire time and attention to the business to which he may be assigned by the party of the first part, and that he will not accept or attend any employment of any kind, during the term of this agreement, other than that provided by this agreement.

Second. And the party of the first part has agreed and does hereby agree, in consideration of such services so to be rendered, to pay to the party of the second part the salary above stipulated at the time and in the manner above mentioned.

Third. It is agreed between the parties hereto, that in addition to the said salary of four thousand (4,000) dollars, above provided to be paid and accepted, the party of the second part shall
305 receive from the party of the first part, in each year, the sum of five hundred (500) dollars whenever he shall have secured in that year for the said party of the first part, or for the Consolidated Ice Machine Company, if so directed by the party of the first part, orders accepted by the party of the first part amounting altogether to one hundred thousand (100,000) dollars.

And if the party of the second part in addition to procuring orders for one hundred thousand (100,000) dollars accepted by said party of the first part, shall in any year, during said three years and before the termination of this agreement, procure for the party of the first part, or for the Consolidated Ice Machine Company, if directed so to do by the party of the first part, additional orders amounting to the sum of one hundred thousand (100,000) dollars, also accepted by the party of the first part, he shall receive from the party of the first part an additional sum of five hundred (500) dollars.

The intent of this third clause of this agreement is that the party of the second part, on the faithful performance of this agreement on his part, shall receive in each year, during the existence of this contract, the sum of four thousand (4,000) dollars as salary, and the additional sum of five hundred (500) dollars for each one hundred thousand (100,000) dollars of business which he may procure to be accepted by the party of the first part, up to the sum of two hundred thousand (200,000) dollars.

In witness whereof, the parties hereto have hereunto set their hands and seals the day and year first above written.

By JOHN C. DE LA VERGNE, *Pres't.* [SEAL.]
JOSEPH KOENIGSBERG. [SEAL.]

306 N. Y. EXHIBIT 5. Nov. 10, '96. Alex. Cameron, Jr., N. Y.

CHICAGO, *May* 20, 1892.

Terms —

1892.

\$44,118.00

CR.

14,625.99

\$29,492.01

307 N. Y. EXHIBIT 6. Nov. 10, '96. Alex. Cameron, Jr., N. P.

The De La Vergne
Refrigerating Machine Company,
manufacturers of
refrigerating and ice machines
and of
anhydrous ammonia.

Office and works, foot of East 138th St. (Port Morris).

Telephone call—"500 Harlem."

Cable address—"Delavergue."

New York, U. S. A.

Proposal and Specification.

NEW YORK, 14th Jan'y, 1892.

To the Bavarian Brewing Company, New York city :

We hereby propose to furnish you with one consolidated 50-ton machine and plant in accordance with the following specification :

Compression side.

The compression side of said plant shall consist of :

Steam-engine.

One vertical steam cylinder of 18 inches diameter and 36 inches stroke, to be provided with automatic Corliss cut-off and governor. Cylinder to be lagged with hard wood in a tasteful manner, the staves bound together with polished (brace) or nickel-plated bands; all finished parts to have a bright polish. A steam stop-valve with polished hand wheel to be fitted to steam cylinder.

Valve gear to be of most modern construction and supplied with patented vacuum dash-pots; and all parts of the valve gear and governor to be of best workmanship and material.

Gas compressors.

There shall be two single-acting compressors of 12 inches diameter and 30 inches stroke, made of best charcoal iron and mounted upon a substantial bed plate and supporting frames, forming what is known as a direct-acting machine. The compressors to be tested at shop to an hydrostatic pressure of 500 lbs. to the square inch and guaranteed to be absolutely gas-tight. All valves to be of best wrought iron or soft steel. Each compressor to be supplied with an equalizing pipe to facilitate starting the machine and with a pipe connection and cock for the purpose of taking indicator cards of compressors.

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Main shaft.

To be of best hammered wrought iron, turned perfectly true and finished all over. Diameter in bearings to be the same as present machine.

Fly-wheels.

To be made of cast iron of the same diameter and weight as present ones.

Platform and stairs.

There shall be provided around compressors a cast-iron platform, and stairs leading to same. Stairs and platform to have a polished brass hand rail supported by finished wrought-iron stanchions.

Anchor plates and foundation bolts.

We will supply the anchor plates and foundation bolts of the machine.

Condensers and oil-coolers.

We will construct and supply six wrought-iron vertical open-air condensers, which shall be 20 feet in length and 24 pipes high. Pipes to be 2 inches in diameter and fitted with our patented screwed and soldered joints, and provided with the necessary water troughs or gutters of copper and galvanized iron. Three of the above condensers to be constructed out of the old condensers of the Bavarian Brewing Co.

Ammonia connections.

There shall be supplied by us the necessary fittings, pipes and stop-cocks, which may be required to connect the compressors, condensers, ammonia tanks and other parts of the apparatus, which constitute the compression side of our plant, and we agree to make the same complete throughout.

Painting.

We will paint the machine after erection in a tasteful and artistic manner, in keeping with this class of machinery, and cover all the pipes, cocks, tanks, fittings, condensers and oil-cooler with a coat of water-proof paint.

Lubricators and oilers.

We will supply one cylinder lubricator of approved design and a complete set of oil cups for the machine, all made of nickel-plated brass.

Wrenches and tools.

A complete set of wrought-iron finished wrenches, and all the small tools necessary to take the machine apart for examination, and for the adjustment of the different parts, to be furnished by us for each machine.

Gauge-plate.

We will connect the machine to present gauges.

Foundation of machine.

We will use the foundation now built for a second machine.

Condenser pan.

You to provide a suitable water-tight floor, at your own cost and expense, on which to set the gas-condensers, and which will lead off the water running from them.

Steam and water pipes.

You to provide the necessary steam pipes and valves of suitable size, and to connect the same with the engine of the apparatus, and to provide the necessary water pipes and valves and to place them in proper position to distribute water over the condensers, and the necessary water pipes and connections required for any other purpose.

Ammonia.

We will supply the first or prime charge of ammonia for the machine and condensers amounting to 500 pounds.

Light.

You to provide good and sufficient light to enable us to put up work in dark places.

Carpenter, mason work, etc.

You to do all of the carpenter or mason work that may be required, such as cutting of holes in walls, ceilings, floors or partitions and repairing the same, or any other carpenter or mason work that may be required in the erection of the machine and plant, and to permit the use of elevators when not otherwise employed.

Freight, Erection, Guarantees, and Special Items.

Freight and cartage.

All the items as furnished by us under this specification is delivered f. o. b. cars or vessel at New York city. The freight and cartage at the place of erection to be paid by us.

Erection, erecting tools and rigging.

We will furnish free of charge all the skilled labor and the use of all the erecting tools and rigging necessary for the erection of plant.

All the common labor required for assisting in the erection of the plant to be paid for by us.

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Workshop.

You to set apart within your premises where the said apparatus is to be erected a suitable place for our use as a workshop and which we may use free of charge as a storehouse for tools and material during the time we are engaged in erecting and completing the machine and plant.

Steam, water, oil, and waste.

You to provide the necessary steam, water, oil and waste for operating the machinery, or for use during the construction of the machine and plant.

Engineer.

You are to employ at your own cost and expense a competent engineer, and in time that he may become familiar with the working of the system and be ready to take charge of the machine and plant as soon as they are in condition to perform work; but we stipulate the right to exercise the entire control over the said machine and plant for a period of three months after date of completion, and—if we deem it necessary—to have the selection of the engineer to take charge of said apparatus; and if through the inefficiency or incompetency of the engineer, or if from any other cause the said apparatus fails to perform the work to our satisfaction, then we may have supervision over the same for a period of one year from the date of its completion.

Authority to use.

We will authorize and permit you to operate the said machine when placed within your premises and to make use of our system as applied to the apparatus together with all of the several parts incidental thereto which are secured (*by*) us by letters patent, free from any royalty over and above the purchase-money hereinafter specified to be paid to us, during and after the completion of said apparatus.

Immunity from cost by infringement.

We will furthermore hold you harmless from all damage sustained by reason of any infringement upon the patents of others.

Plans, drawings, and templets.

We will furnish all the plans, drawings and templets necessary for the erection of the plant.

Testing.

In case you request us to make a test of the machine and plant, as hereinbefore specified, it is understood that you will pay all the expenses incidental thereto, viz: fuel, water, oil, waste and
311 other items; and pay the engineers, fireman and all labor, the same as if you were operating the plant yourself. We to furnish free of charge, as many competent experts as we deem necessary, one of such experts to have entire control over the plant and authority to direct your men.

Verbal understanding.

There is no verbal understanding outside of this specification and annexed agreement as written and printed.

Machinery not specified.

Any machinery or parts thereof not mentioned in this specification is to be paid for by you.

Guarantees.

We will construct the said 50-ton consolidated refrigerating machine and plant in all of its parts in a thorough and workmanlike manner, using none but the best materials, and under the stipulated conditions will guarantee that the said plant will perform the work herein specified, and if the machine and plant are properly handled will guarantee that the compressors will not deteriorate in efficiency, and we will warrant and maintain the engine, compressors, piping and tanks in good working order for one year from the date of their completion, and will replace any part of said machine or plant which may prove defective, either in material or workmanship, during the time of guarantee, the usual wear and tear, and damages caused by your negligence or carelessness or that of your agents or workman excepted.

We will further supply erect and connect one of our "bright iron-pipe" direct ammonia Bandelot coolers which will be of a size suitable to your present beer-cooler. Shall move from old brewery and erect in the Knickerbocker brewery the attemperatur coil or water-cooler and connect same to new system, using ammonia gas direct, through said coil. Shall also make (*etc*) cross-connections to machines, so that either machine can be used in the brine-cooling coils or on the Bandelot cooler as the case may be. And we will allow you the use of sufficient pipes taken out of the cellars of the old brewery to properly pipe the additional cellar or fermenting room in the Knickerbocker brewery; you doing all the work of piping said cellar and supplying all the other material and labor necessary therefor.

Respectfully submitted,

THE DE LA VERGNE REFRIGERATING
MACHINE CO.,

Per JNO. F. DUFFY.

Contract.

This agreement made this 18th day of January, 1892, by and between the De La Vergne Refrigerating Machine Com-
312 pany a corporation existing under and pursuant to the laws of the State of New York, having its principal place of business in the city, county and State of New York, party of the first part, and the Bavarian Brewing Company of the city, county and State of New York, party of the second part.

Witnesseth: That the party of the first part, and the party of the second part, for and in consideration of one dollar, by each to the other paid, the receipt of which is hereby acknowledged, and for other valuable considerations which are hereinbefore specified, do hereby promise, covenant and agree each with the other, and do hereby bind themselves, their successors, legal representatives, heirs, executors, administrators and assigns, to faithfully perform, fulfill and carry out all of the several provisions, conditions and requirements in accordance with the specifications forming part of this agreement and hereunto annexed, to wit:

That the said party of the first part hereby agrees to construct for and deliver to the said party of the second part on their premises situated on 18th street between 7th and 8th avenues, New York city, a refrigerating apparatus, under letters patent owned or controlled by the De La Vergne Refrigerating Machine Company, and in accordance with the annexed specification, for the sum of (\$8,000.00) eight thousand dollars, and the old refrigerating machines and plant in the old brewery, consisting of: two machines with steam-engine and compressors on each with all of the necessary parts and requisites therefor. All the ammonia condensers; ammonia tanks and connections, oil-cooler, all the direct expansion coils and the brine-cooling coils in the brine tank with all the connections attached thereto; also all of the connections stop-cocks fittings, hangers, bearing bars, disks and appurtenances belonging to or attached to the direct expansion cellar coils. And all of the ammonia with which the said plant is charged. The present condensing coils and tank connected to the machine now in operation in the Knickerbocker brewery, to also belong to us, when said machine is connected to our vertical open-air condensers.

Terms of payment to be as follows:

On the date on which the machine and plant is ready to operate, eight notes of (\$1,000.00) one thousand dollars each are to be given by the party of the second part to the party of the first part, said notes bearing date on which the machine and plant is ready to operate, viz: 18th day of March '92, and payable in one, two, three, four, five, six, seven and eight months thereafter; the last six notes bearing interest at the rate of six per cent. per annum. That is:

313 One note for one thousand dollars, dated 18th March, '92, and payable in 30 days thereafter.

One note for one thousand dollars, dated 18th March, '92, and payable in 60 days thereafter.

One note for one thousand dollars, dated 18th March, '92, and payable in 90 days thereafter, with interest at the rate of six per cent. per annum.

One note for one thousand dollars, dated 18th March, '92, and payable in 120 days thereafter, with interest at the rate of six per cent. per annum.

One note for one thousand dollars, dated 18th March, '92, and payable in 150 days thereafter, with interest at the rate of six per cent. per annum.

One note for one thousand dollars, dated 18th March, '92, and payable in 180 days thereafter, with interest at the rate of six per cent. per annum.

One note for one thousand dollars, dated 18th March, '92, and payable in 210 days thereafter, with interest at the rate of six per cent. per annum.

And one note for one thousand dollars, dated 18th March, '92, and payable in 240 days thereafter, with interest at the rate of six per cent. per annum.

It is hereby agreed and understood that we shall have free and uninterrupted access to the old machines and appurtenances speci-

fied herein and can move said machinery and appurtenances 60 days from the date on which this contract is executed. And further, that we can remove two of the old condensers from the old brewery at any time after the date on which this contract is executed.

Time of completion.

That the party of the first part will complete the compressors, their connections, the condenser and all expansion coils, and all of the parts to be furnished by the party of the first part in accordance with the annexed specification, and have the same in condition ready to do work in 60 days after the date on which this contract is executed, providing the said party of the first part is in no way delayed by the party of the second part, and has free and uninterrupted access for men and material to each and all of the several rooms, cellars or chambers wherein the work is to be performed, at least 40 days before the specified time for completion. Any delay caused by the party of the second part changing the plans agreed upon between the parties hereto shall be added to the time of completion and the cost of such changes shall be at the expense of the party of the second part.

And it is further agreed, that as soon as the whole or any portion of the material for the machine and plant is delivered on the premises of the party of the second part, any loss or damage by fire or otherwise is to be borne by the said party of the second part.

In witness whereof on the day and year first written, the said party of the first part has caused its seal to be affixed and its president to subscribe to the same, and the said party of the second part has caused its president and treasurer to subscribe to the same.

THE DE LA VERGNE REFRIGERATING
MACHINE COMPANY, [SEAL.]

By JOHN C. DE LA VERGNE, *Pres't.*

BAVARIAN BREWING CO.,

By JOHN M. MOSER, *President.*

M. J. GROHMAN, *Treas.*

NEW YORK, *March 30, 1892.*

Supplement of Job 340C.

According to a verbal agreement with Mr. Scharmann, we are to furnish the Bavarian Brewing Co. with one ammonia pressure gauge, one ammonia vacuum gauge and gauge plate for same. Furthermore, 2 copper overflow gutters for the direct ammonia wort Bandle, and one 15-inch storage or liquid receiver tank—the whole for an additional sum over the contract of \$186.00.

One hundred and eighty-six dollars.

THE DE LA VERGNE REFRIGERATING
MACHINE CO.,
Per GEO. F. MEYER.

N. Y. EXHIBIT 7. Nov. 10, '96. Alex. Cameron, Jr., N. P.

Specification.

NEW YORK, October 17th, 1891.

Henry Kreiss, Esq., Pottstown, Pa.

DEAR SIR: I will furnish you two of the most improved thirty-five ton vertical refrigerating machines, complete and ship the same sixty days after receipt of order, f. o. b. cars, Chicago, for the sum of twelve thousand dollars (\$12,000.00), payable in the following manner: Twelve hundred dollars (\$1,200.00) with receipt of order; twenty-four hundred dollars (\$2,400.00) on delivery of bills of lading; twenty four hundred dollars when machine is erected
315 (\$2,400.00) and six thousand dollars (\$6,000.00) after 14 days' trial run of machine, during which time the same has proved to be first class in workmanship and material, provided all parts have been properly erected. This last payment shall be made cash or at your option by two notes of three thousand dollars each, 60 and 90 days respectively, with interest at six per cent. per annum, provided those notes are made satisfactory and acceptable to me.

The engines to be furnished shall be of the Consolidated Ice Machine Co.'s design finished and complete in every particular and of our latest improved Corliss automatic pattern, vertical with cylinder 16" bore and 30" stroke, throttle, valve motion, governor and vacuum cushion dash-pots. The steam cylinder shall be made in dry sand and of the best iron, bored smooth and true, finished in first-class manner and lagged ornamentally with hard wood. There shall be two compressors of vertical single-acting Consolidated pattern, 10" bore by 30" stroke made of close-grain dry-sand casting and surrounded by copper water jackets, lagged ornamentally with hard wood and bound with brass bands. The suction and discharge valves to be of the Consolidated pattern, made of the best steel and held in place by yokes and set-screws, in such a manner that they may be removed without breaking any ammonia pipe connections.

The compressors stuffing boxes shall be provided with worm gear and hand-wheel attachment so placed as to be adjustable while the engine is in motion.

The piston-rods shall be made of best steel, turned and finished true from end to end. All connecting rods shall be made of best hammered iron, finished all over and provided with adjustable phosphor-bronze boxes.

The crank shafts shall be made of best hammered iron, finished all over. All journals shall be fitted with best quality phosphor-bronze boxes, carefully bored and scraped to bearings.

The cranks shall be extra heavy and provided with best steel wrist pins. All cross-heads shall be made of best crucible steel, and fitted with best phosphor-bronze shoes. The fly-wheels of each machine shall be two in number carefully balanced, and located each between two bearings on either side of crank-shaft center.

All bearing surfaces to bed plate and entablature shall be planed to insure perfect alignment. Each engine shall be provided with iron platform around cylinders, and iron stairs to same, with polished hand rail supported by turned iron pillars around platform and around stairs.

316 All parts of the engine shall be made to gauge and templet so that any part may be duplicated in case of necessity, on short notice.

I will furnish one extra set of valves for compressors, and one extra set of metallic rings for compressor pistons. I will also furnish with each engine a nickel-plated quart lubricator, and the necessary oil cups, four grease pans for main bearings, two piston saucers and two guide-drips. The engine shall be complete in all its parts and finished in a workmanlike manner for the purposes for which it is designed.

Yours very truly,

J. KOENIGSBERG.

In addition to the foregoing proposition, I agree to furnish you with a third machine, of the same capacity as described above, for the sum of six thousand dollars (\$6,000), under the same conditions of payment as above mentioned, and will hold this offer open for your acceptance, until January 1st, 1893.

Yours very truly,

J. KOENIGSBERG.

I hereby accept the above proposition in all its terms and conditions.

HENRY KREISS.

NEW YORK, *November 18th, 1891.*

I hereby transfer the above contract to the Reading Cold Storage Company, with all its rights and obligations.

HENRY KREISS.

NEW YORK, *November 18th, 1891.*

I hereby accept the transfer of the above contract to the Reading Cold Storage Company, in all its parts.

JOS. KOENIGSBERG.

NEW YORK, *November 18th, 1891.*

Received of the Reading Cold Storage Company, twelve hundred dollars (\$1,200), as first payment due under the above contract.

JOS. KOENIGSBERG.

For a valuable consideration I hereby sell, assign, transfer and set over unto the De La Vergne Refrigerating Machine Co., the above contract, in all its terms and conditions, to be fulfilled by it and to collect, receive and appropriate for its own use all the profits therefrom.

JOS. KOENIGSBERG.

Dated at New York, Feb. 13th, 1892.

317

N. Y. EXHIBIT 7 A. Nov. 18, '96.

File with job 336 C—Contract.

Jos. Koenigsberg, Esq., New York city.

DEAR SIR: We will furnish you two of the most improved thirty-five-ton, vertical refrigerating machines, complete, and ship the same sixty days after the above date, f. o. b. cars, Chicago, for the sum of nine thousand nine hundred dollars (\$9,900.00), payable in the following manner: Three thousand dollars (\$3,000.00) on receipt of machinery in New York, and six thousand nine hundred dollars (\$6,900.00), after the machines have proved, during a trial run of fourteen days after their erection, to be of first-class workmanship and material. This last payment shall be made by two good notes of thirty-four hundred and fifty dollars (\$3,450.00) each, of sixty and ninety days, respectively, provided those notes are satisfactory and acceptable to us, otherwise, this payment to be cash.

The engine to be furnished shall be of the Consolidated Ice Machine Company's design, finished and complete in every particular, and of our latest improved Corliss automatic pattern, vertical, with cylinder 16" bore and 30" stroke, throttle, valve motion, governor and vacuum cushion dash-pots. The steam cylinder shall be made in dry sand, and of the best iron, bored smooth and true, finished in first-class manner and lagged ornamentally with hard wood. There shall be two compressors of vertical single-acting Consolidated pattern 10" bore by 30" stroke, made of close-grained dry sand casting, and surrounded by copper water jackets, lagged ornamentally with hard wood and bound with brass bands. The suction and discharge valves to be of the Consolidated pattern, made of the best steel, and held in place by yokes and set-screws in such a manner that they may be removed without breaking any ammonia pipe connections.

The compressor stuffing boxes shall be provided with worm gear and hand-wheel attachments, so placed as to be adjustable while the engine is in motion.

The piston-rods shall be made of best steel, turned and finished true from end to end. All connecting rods shall be made of best hammered iron, finished all over and provided with adjustable phosphor bronze boxes.

The crank shafts shall be made of the best hammered iron, finished all over. All journals shall be fitted with best quality phosphor bronze boxes carefully bored and scraped to bearings.

The cranks shall be extra heavy and provided with best steel wrist pins. All cross-heads shall be made of best crucible steel and fitted with best phosphor bronze shoes. The fly-wheels of
318 each machine shall be two in number carefully balanced, and located each between two bearings on either side of crank-shaft center.

All bearing surface of bed plate and entablature shall be planed to insure perfect alignment. Each engine shall be provided with

iron platform around cylinders and iron stairs to same, with polished hand rail supported by turned iron pillars around platform and around stairs. All parts of the engine shall be made to gauge and templet, so that any part may be duplicated in case of necessity on short notice.

We will furnish one extra set of valves for compressors, and one extra set of metallic rings for compressor pistons. We will also furnish with each engine a nickel-plated qt. lubricator, and the necessary oil cups, four grease pans for main bearings, two piston saucers and two guide-drips. The engine shall be complete in all its parts and finished in a workmanlike manner for the purpose for which it is designed.

Yours very truly, JOHN FEATHERSTONE'S SONS.

I hereby accept the above proposition in all its terms and conditions.

J. KOENIGSBERG.

N. Y. EXHIBIT 7 B. Nov. 10, '96.

(Copy.)

Bond.

Whereas, Joseph Koenigsberg, of the city of New York, State of New York, has sold and contracted unto the Reading Cold Storage Company of Reading, Pennsylvania, two refrigerating machines for certain duty to be done in the cold-storage house of the said The Reading Cold Storage Company, located in Reading, Pa., wherein said contract provides that said machinery is to be placed, particular reference being made to said contract therefor, hereunto attached, and the date of which is the 17th day of November, 1891. And the said The Reading Cold Storage Company being desirous of full protection in the use and peaceable possession of the said machinery.

Therefore, the said Joseph Koenigsberg, as principal, and John C. De La Vergne, of the city of New York, as surety, do hereby bond and obligate themselves, their heirs, assigns and successors in the sum of twelve thousand (\$12,000.00) dollars, lawful money of the United States, well and truly to be paid unto the said The Reading Cold Storage Company. The condition of this bond being that if the said Joseph Koenigsberg shall at all times fully protect the said The Reading Cold Storage Company in the peaceable and quiet possession and use of the said machinery, and as against any and all suits for the infringement of letters patent, and from any damages that may be incurred in connection with or resulting from such suits, and shall perform any and all stipulations and guarantees contained in said contract hereinbefore referred to, and which is made a part hereof, then, and in such event, this bond shall be null and void and without effect; otherwise to remain in full force and obligation.

JOSEPH KOENIGSBERG.

JOHN C. DE LA VERGNE.

New York, November 18th, 1891.

STATE OF NEW YORK, }
County of New York, } ss:

On this 18th day of November, in the year 1891, before me personally came Joseph Koenigsberg and John C. De La Vergne to me known as the individuals described in and who executed the within bond and severally acknowledged that they executed the same for the purposes therein mentioned.

[SEAL.]

LOUIS BARON,
Notary Public No. 21, City and
County of New York.

N. Y. EXHIBIT 8. Nov. 10, '96. Alex. Cameron, Jr., N. P.

File with job 336 C.

213 EAST 54TH STREET, NEW YORK, January 11th, 1892.

Mess. Ph. & Wm. Ebling Brewing Co., Morrisania, New York.

GENTLEMEN: I beg to submit for your consideration and approval the following proposition, viz:

I propose to furnish you with one of the most improved 50-ton Consolidated refrigerating machines, complete in every respect as per the following specification:

Engine.

The engine on this machine shall be of the most improved Corliss automatic pattern, 18" diameter by 36" stroke, complete with valve motion, dash-pots, throttle and governor. The cylinder to be lagged in an ornamental manner with hard wood, and insulated with asbestos and hair felt.

Pumps.

The two ammonia compression pumps on this machine shall be of the latest improved Consolidated pattern, single-acting, 12" diameter by 30" stroke, each complete with heads, valves, water jackets feed and overflow pipes and gas cross connecting pipes and valves. These pumps to be so constructed that the cylinder heads may be removed without breaking either suction or discharge pipe connections. Each head shall contain one suction and two discharge valves in the pump head in such a manner that they may be removed and examined in the shortest possible time. I propose to furnish for each compressor, duplicate sets of suction and discharge valves, and duplicate ammonia metal piston rings. The water jackets on those compressors shall be lagged in an ornamental manner with hard wood and bound with brass bands.

All piston-rods about the machine shall be made of steel, turned and lapped true to gauge from end to end. All connecting rods to be of the best hammered iron, finished all over and fitted with best quality phosphor or carbon bronze boxes.

Crank shaft to be of best hammered iron, finished all over and

fitted with heavy cranks and special wrist pins. Cross-heads to be of steel and carefully scraped to bearings on guides. Journal bearings to be fitted with phosphor or carbon bronze boxes of adjustable pattern.

I propose to furnish iron platform around cylinder, and supplementary platform to guides and governor, with turned iron pillars and brass hand rail around platform and on stairs. Iron stairs to be furnished to platform, and special upper and lower platform plates between machines, connecting the same if required. I also propose to utilize your old stairs and hand rails to connect upper and lower platforms of your present machine, and to place in position in front of doorway the surplus end plate of lower platform of your present machine, if the same be required.

It is expressly understood that this machine is to be similar to your present 50-ton Consolidated refrigerating machine.

I propose to furnish this machine in accordance with the foregoing specifications, set up and delivered on foundation which I will provide and build at my expense in your brewery at Morrisania, properly connecting the machine throughout, complete and ready for operation.

I positively guarantee:

First. That only first-class material and workmanship shall be employed in the construction of the machine, and I will at my own expense replace any parts found defective either in material or workmanship.

Second. That the machinery shall operate regularly and satisfactorily with proper care and attention.

Third. That this machine shall be capable and shall cool down, and maintain at satisfactorily low temperature of from 1 to 2 degrees

Reaumur in your storage and racking rooms, amounting to
321 an aggregate of 300,000 cubic feet of space in your brewery;

and that in addition to the above specified work, the said machine shall cool down a daily brewing of three hundred barrels of beer, from 85 to 40 degrees Fahrenheit, provided the upper portion of your Baudelot cooler is supplied with well or hydrant water as is usual with such coolers; said water to be of a temperature of 60 degrees Fahrenheit.

Fourth. That this machine in performing the above-specified work, shall not consume in excess of three gross tons of first-class steam coal, each 24 hours of operation, with proper boilers and proper firing, and that the water necessary for condensing purposes, shall not exceed 50 to 55 gallons per minute, at a temperature of 60 degrees Fahrenheit.

Fifth. In event of the machine failing to do all that I have hereinbefore guaranteed for it, I will at your election remove the same from your premises, at no expense to you, and will refund any and all moneys that I may have received on account of same.

Sixth. I will execute and deliver to you a good and legal bond in the full amount of contract price of entire work, in ten thousand five hundred dollars (\$10,500.00) insuring to you the full and faith-

ful performance of each and every of the stipulations and agreements herein made, and also guaranteeing you against any loss, damage or expense for suits that may be brought against you, for alleged infringement of letters patent granted to others. Said bond to be signed by me as principal, and by J. C. De La Vergne as surety, and to be delivered properly signed and executed, when the first payment shall be made by you.

Seventh. I will hold you free and harmless from any and all suits that may be brought against you for alleged infringement of letters patent granted to others, and will defend any and all such suits, paying all costs, damages or expense arising therefrom and in connection therewith.

I will furnish a competent engineer to superintend the erection of the machine, and who shall remain with the plant for a period of 30 days, after it shall have been erected on your premises, in order to give it a thorough test in all its parts, and to convince you that it will fulfill my guarantees in every respect; said engineer shall also instruct your operatives in the proper care and operation of the machine.

Under this proposition you will be required:

First. To provide a suitable and approved building for the erection of the machine.

322 Second. To provide the necessary steam-boiler power, of ample capacity to operate the machine; this steam supply coming from boilers that will evaporate at least eight pounds of water per pound of coal consumed, and all necessary steam and exhaust pipe connections from engine.

Third. To provide the necessary water supply and connections for our gas pumps.

Fourth. To provide a competent engineer to be present during the erection of the machine, in order that he may become familiar with the construction thereof, and who is to receive instructions from our superintendent in the proper care and operation.

Fifth. To afford me every facility for the advancement of the work of erecting the machine on your premises, without unnecessary expense or delay to me.

Sixth. To furnish one mason and the necessary brick for the foundations at your expense.

I will agree to have the machine erected complete on your premises and ready for operation, ninety days after your buildings are finished and ready to receive the same. I am to paint the machine in a first-class manner, in colors to suit your taste.

The price for this machine complete and in running order, and connected with your present refrigerating apparatus, interchangeably, is ten thousand five hundred dollars (\$10,500.00), payable in the following manner:

Two thousand six hundred and twenty-five dollars (\$2,625.00), on arrival of machinery in New York; two thousand six hundred and twenty-five dollars (\$2,625.00) after 30 days' trial run, during which time machine has proved to fulfill my guarantees in every respect. On same date your 60 days' note for two thousand six hundred and

twenty-five dollars (\$2,625.00), and on same date your 90 days' note for two thousand six hundred and twenty-five dollars (\$2,625.00).

Respectfully submitted.

J. KOENIGSBERG.

We hereby accept the foregoing proposition in all its terms and conditions.

PH. & WM. EBLING BREWING CO.,
By PH. EBLING, *Pres.*

For a valuable consideration I hereby sell, assign, transfer and set over unto the De La Vergne Refrigerating Machine Co. the
323 above contract, in all its terms and conditions, to be fulfilled by it, and to collect, receive and appropriate for its own use, all the profits therefrom.

JOSEPH KOENIGSBERG.

Dated at New York, Feb. 13th, 1892.

N. Y. EXHIBIT 8 A. Nov. 10, '96.

Know all men by these presents: that we Joseph Koenigsberg of the city of New York, county and State of New York, as principal and John C. De La Vergne of said city of New York, as surety, are held and firmly bound unto the Philip & William Ebling Brewing Company of the City of New York, in the penal sum of ten thousand, five hundred dollars (\$10,500), lawful money of the United States, for the payment of which we bind ourselves, our heirs, executors, administrators and assigns firmly by these presents.

Dated New York, Feb. 13th, 1892.

The condition of the above obligation is such that whereas Joseph Koenigsberg has sold and contracted with the Philip & Wm. Ebling Brewing Company for one 50-ton refrigerating machine, with details and appurtenances, for certain specified guaranteed duty to be done in the brewery of the said Philip & Wm. Ebling Brewing Company located in the city of New York, and said Ebling Brewing Company being desirous of full protection in the use and peaceable possession of said machine, details and appurtenances.

Now therefore, if the said Joseph Koenigsberg shall perform the stipulation and agreements contained in said contract, which is hereby referred to and made a part hereof, and shall defend the said Philip & Wm. Ebling Brewing Company in the peaceable and quiet possession of said machinery and appurtenances as against any and all suits for infringement of letters patent, and from any damages which may be incurred in connection with or resultant from such suits, then and in such events this obligation shall be null and void, otherwise it shall remain in full force and effect.

JOSEPH KOENIGSBERG. [SEAL.]
JOHN C. DE LA VERGNE. [SEAL.]

STATE OF NEW YORK, }
 City and County of New York, } ss:

On this 13th day of February, in the year 1892, before me personally came Joseph Koenigsburg and John C. De La Vergne, to me known to be the individuals described in and who executed the above instrument and acknowledged that they executed the same for the purposes therein mentioned.

[SEAL.]

LOUIS BARON,
 Notary Public, No. 21, City and County of New York.

324 N. Y. C. EXHIBIT 9. Nov. 10, '96. Alex. Cameron, Jr., N. P.

Job 349 C.

No. 213 EAST 54TH STREET,
 NEW YORK, February 8th, 1892.

The Reading Cold Storage Co., Reading, Pennsylvania.

GENTLEMEN: I propose to furnish you one of the most improved thirty-five ton vertical refrigerating machines, complete, and ship the same thirty-five days after the acceptance of this proposition, f. o. b. cars Chicago, for the sum of six thousand dollars (\$6,000.00) payable in the following manner: Ten per cent. or six hundred dollars (\$600.00) with receipt of order; twenty per cent. or twelve hundred dollars (\$1,200.00) on delivery of bill of lading; twenty per cent. or twelve hundred dollars (\$1,200.00) when machine is erected, and fifty per cent. or three thousand dollars (\$3,000.00) after fourteen days' trial run, during which the same has proved to be first class in workmanship and material, provided all parts have been properly erected. This last payment shall be made cash or at your option by two notes of fifteen hundred dollars each (\$1,500.00) sixty and ninety days respectively, with interest at six per cent. (6%) per annum, provided these notes are made satisfactory and acceptable to me.

The engine to be furnished shall be of the Consolidated Ice Machine Company's design, finished and complete in every particular, and of our latest improved Corliss automatic pattern, vertical, with cylinder 16" bore and 30" stroke, throttle, valve motion, governor and cushion vacuum dash-pots. The steam cylinder shall be made in dry sand and of the best iron, bored smooth and true, finished in a first-class manner and lagged ornamentally with hard wood. There shall be two compressors of vertical single-acting Consolidated pattern, 10" bore by 30" stroke, made of close-grain dry-sand casting, and surrounded by copper water jackets, lagged ornamentally with hard wood and bound with brass bands. The suction and discharge valves to be of the Consolidated pattern made of the best steel and held in place by yoke and set-screws, in such a manner that they may be removed without breaking any ammonia pipe connections.

The compressor stuffing boxes shall be provided with worm gear

and hand wheel attachment, so placed as to be adjustable while the engine is in motion.

The piston-rods shall be made of the best steel, turned and finished from end to end. All connecting rods shall be made of the best hammered iron, finished all over and provided with adjustable phosphor-bronze boxes.

The crank shafts shall be made of the best hammered iron, finished all over. All journals shall be fitted with best quality
325 phosphor-bronze boxes carefully bored and scraped to bearings.

The cranks shall be extra heavy, and provided with best steel wrist pins. All cross-heads shall be made of the best crucible steel, and fitted with best phosphor-bronze shoes. The fly-wheels of the machine shall be two in number carefully balanced, and located each between two bearings on either side of crank-shaft center.

All bearing surface of bed plate and entablature shall be planed to insure perfect alignment. The engine shall be provided with iron platform around cylinders and iron stairs to same with polished hand rail, supported by turned iron pillars, around platform and on stairs.

All parts of the engine shall be made to gauge and templet, so that any part may be duplicated, in case of necessity on short notice.

I will furnish one extra set of valves for compressors, and one extra set of metallic rings for compressor piston. I will also furnish with the engine a nickel-plated quart lubricator, and the necessary oil cups, four grease pans for main bearings, two piston saucers and two guide-drips. The engine shall be complete in all its parts and finished in a workmanlike manner, for the purpose for which it is designed.

Yours very truly,

J. KOENIGSBERG.

We hereby accept the above proposition in all its terms and conditions.

READING COLD STORAGE CO.,
C. Q. GULDIN, *Pres.*

Reading, Pa., Feb. 10th, 1892.

The bond referred to in above contract I agree to deliver to you within four days from Feb. 10th, 1892.

J. KOENIGSBERG.

It is understood by both parties that the word sixty on first page of contract has been stricken out and the word thirty-five inserted for same.

J. KOENIGSBERG.
READING COLD STORAGE CO.
C. Q. GULDIN, *Pres.*

For a valuable consideration I hereby sell, assign, transfer and set over unto the De La Vergne Refrigerating Machine Co. the above contract, in all its terms and conditions to be fulfilled by it, and to

collect, receive and appropriate for its own use all the profits therefrom.

JOSEPH KOENIGSBERG.

Dated at New York, Feb. 13th, 1892.

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N. Y. EXHIBIT 9 A. Nov. 10, '96.

Know all men by these presents: that we, Joseph Koenigsberg of the city of New York, county and State of New York, as principal, and John C. De La Vergne of said city of New York, as surety, are held and firmly bound unto the Reading Cold Storage Company of the City of Reading, State of Pennsylvania, in the penal sum of six thousand dollars lawful money of the United States, for the payment of which we bind ourselves, our heirs, executors, administrators and assigns, firmly by these presents.

Dated New York, Feb. 13th, 1892.

The condition of the above obligation is such that whereas Joseph Koenigsberg has sold and contracted with the Reading Cold Storage Company for one 35-ton refrigerating machine, with details and appurtenances, for certain specified guaranteed duty to be done in the premises of the said Reading Cold Storage Company located in the city of Reading, State of Pennsylvania, and said Reading Cold Storage Company being desirous of full protection in the use and peaceable possession of said machine, details and appurtenances.

Now, therefore, if the said Joseph Koenigsberg shall perform the stipulations and agreements contained in said contract, which is hereby referred to and made a part hereof, and shall defend the said Reading Cold Storage Company in the peaceable and quiet possession of said machinery and appurtenances as against any and all suits for infringement of letters patent, and from any damages which may be incurred in connection with or resultant from such suits, then and in such events this obligation shall be null and void, otherwise it shall remain in full force and effect.

JOSEPH KOENIGSBERG. [SEAL.]

JOHN C. DE LA VERGNE. [SEAL.]

STATE OF NEW YORK, }
City and County of New York, } ss:

On this 13th day of February, in the year 1892, before me personally came Joseph Koenigsberg and John C. De La Vergne, to me known to be the individuals described in and who executed the above instrument and acknowledged that they executed the same for the purposes therein mentioned.

LOUIS BARON,

[NOTARY SEAL.] Notary Public, No. 21, City and County of N. Y.

EX. 9 B. New York, Nov. 10, 1896. W. H. M.

Bond.

Whereas Joseph Koenigsberg of the city of New York, of the State of New York, who is in the business of manufacturing and

327 selling ice-making and refrigerating machinery, has sold and contracted unto the Ph. & Wm. Ebling Brewing Company, of the city of New York, State of New York, one 50-ton refrigerating machine, with details and appurtenances, for certain specified guaranteed duty to be done in the brewery of the said Ph. & Wm. Ebling Brewing Company, located in the city of New York. Wherein said contract provided that said machinery is to be placed, particular reference being made to said contract hereunto attached and the date of which is the 11th day of January, 1892, and said Ebling Brewing Company being desirous of full protection in the use and peaceable possession of the said machinery, details and appurtenances.

Now therefore, the said Joseph Koenigsberg as principal and John C. De La Vergne of the city of New York as surety do hereby bind and obligate themselves, their heirs and assigns and successors in the sum of ten thousand five hundred dollars (\$10,500.00) lawful money of the United States well and truly to be paid unto the said Ph. & Wm. Ebling Brewing Company. The condition of this bond being that if said Joseph Koenigsberg shall at all times fully protect the said Ph. & Wm. Ebling Brewing Company in the peaceable and quiet possession and use of said machinery and appurtenances and as against any and all suits for infringement of letters patent, and from any damages that may be incurred in connection with or resultant from such suits, and shall perform any and all stipulations and agreements contained in said contract hereunto referred to, and which is made a part hereof, then and in such event this bond shall be null and void and without effect. Otherwise to remain in full force and obligation.

Ex. 10. New York, November 10th, 1896. W. H. M. Alex. Cameron, Jr., N. P.

NEW YORK, Feb'y 4th, 1891.

The De La Vergne Refrig. Mach. Co. to H. W. Guernsey, Dr.

For 22 days' services in investigating the affairs of the Consolidated Ice Machine Co., of Chicago, at \$50.00.	\$1,100.00
Expenses.....	220.61
	<hr/>
	\$1,320.61
1890.	CR.
Dec. 30. By cash from De La V. Co.....	\$200
1891.	
Jan'y 19. By cash from A. Ruemmeli.....	100
	<hr/>
	300.00
	<hr/>
	\$1,020.61

Rec'd paym't with thanks.

H. W. GIERNSEY.

328 Ex. 11. New York, November 10th, 1896. W. H. M. Alex. Cameron, Jr., N. P.

Office of John R. Waters, 86 Worth street.

NEW YORK, 1st October, 1891.

Received Oct. 3, 1891.

De La Vergne Refrigerating Machine Co. to John R. Waters, Dr.

For services during September, 1891, in New York and Chicago, investigating questions concerning N. Y. Steam Co., Consolidated Ice Machine Co., and the re-capitalization of the De La Vergne R. M. Co., five days..... \$125.00
Traveling expenses to, at, and from Chicago—defrayed by individual underwriters..... No charge.

\$125.00

Received payment,

JNO. R. WATERS.

New York, 27th Oct., 1891.

Mr. De La Vergne said to pay it.

SCHWEITZER.

Office ex. ac. N. Y. Co. bk.
10, 24, '91.

Ex. 12. New York, November 10th, 1896. W. H. M. Alex. Cameron, Jr., N. P.

"Copy of By-laws of the Company as to Duties of the Treasurer."

Sec. II.—Duties of the treasurer.

It shall be the duty of the treasurer to have the care and custody of all the funds of the company which may come into his hands, and to promptly deposit the same as treasurer in such bank or banks as the trustees may elect; he shall sign all checks, drafts, notes and orders for the payment of money, which shall be countersigned by the president; and he shall pay out and dispose of the same only under the direction of the president; he shall endorse for deposit or collection all notes, drafts, checks and bills of the company; all payments shall be made by check of the company and vouchers or receipt taken therefor, except payments for help and petty business expenses; he shall render a statement of his cash account at each regular meeting of the board; he shall at all reasonable times exhibit his books and accounts to any trustee or stockholder of the company upon application at the office of the company during business hours; he shall countersign all certificates of stock signed by the president; he shall give such bonds for the faithful performance of his duties, to the amount to be fixed by vote of the trustees, with two or more sufficient sureties, in such form

as shall be approved by the board of trustees, the said bond and sureties to be renewed or increased as the trustees may require.

In the absence of the treasurer a majority of the board of trustees may appoint a treasurer *pro tem.* who shall have such powers during the absence of the treasurer, as shall then be given him by the board of trustees.

Ex. 13. New York, November 10th, 1896. W. H. M. Alex. Cameron, Jr., N. P.

Stock the Consolidated Ice Machine Co.

No. of certificate.	No. of shares.	Name.	Transferred to—
4	250	Jacob W. Skinkle.....	John C. De La Vergne.
5	50	Leo Rassieur.....	" "
6	50	" ".....	" "
7	50	" ".....	" "
8	50	" ".....	" "
15	90	E. Jungenfeld estate.....	(Blank.)
16	225	Edw. Mallinckrodt.....	John C. De La Vergne.
17	25	Leo Rassieur & P. J. Lingenfelder, executors of Edmund Jungenfeld's estate.....	" "
18	70	Fred Widmann.....	" "
12	70	Anna Jungenfeld.....	" "
13	70	P. J. Lingenfelder & Leo Rassieur, trustees for Carl Jungenfeld.	" "
	1,000		

NOTE.—Certificate No. 15 is indorsed in blank.

Certificate No. 17 is transferred and assigned "to John C. De La Vergne by direction of the German Savings Institution, owner thereof," but the transfer is signed by the executors of the Jungenfeld estate. How can they transfer it if the German Savings Institution own it? None of the transfers are dated.

Ex. 14. November 11th, 1896. W. H. M. Alex. Cameron, Jr., N. P.

The De La Vergne Refrigerating Machine Co., foot of East 138th St.

NEW YORK, April 20, 1891.

R. E. Jenkins, Esq., 89 E. Madison St., Chicago, Ill.

MY DEAR SIR: In regard to the memorandum given me by you on April 18th, I assume that the sums of money named therein to be paid to you are to be in full for all counsel fees and disbursements. Please inform me how this is understood by you and oblige,

Yours very truly,

JOHN C. DE LA VERGNE.

Ans. Apr. 22, '91.

330 Ex. 15. November 11th, 1896. W. H. M. Alex. Cameron, Jr., N. P.

The De La Vergne Refrigerating Machine Co., foot of East 138th St.

NEW YORK, April 20, 1891.

Mr. R. E. Jenkins, Chicago, Ill.

MY DEAR SIR: I telegraphed you this morning as follows: "Please send as soon as possible promised copies of correspondence; also a detail list of creditors with amounts due them and their addresses," which I now confirm.

Would also be very much pleased if you could send me the amounts which are due to the company at the present time from all of its customers. Also a list of the notes which you have on hand belonging to the company; by whom made, amount, when due and whether interest bearing or not. Kindly do this without any delay, and oblige,

Yours very truly, JOHN C. DE LA VERGNE.

Ans. Apr. 22, '91.

Ex. 16. November 11th, 1896. W. H. M. Alex. Cameron, Jr., N. P.

(Telegram)

W. 796 ny hy sm 26 pd.

1428

Received at Chicago, April 28, 1891.

532 pm 1890

Dated Mott Haven N. Y. 28.

To R. E. Jenkins, 89 East Madison St., Chicago:

Am informed that the Trenton Hygienic Ice Co. sent statement last Saturday of what they wished done. Please send us copy of it at once.

JOHN C. DE LA VERGNE.

Ex. 17. November 11th, 1896. W. H. M. Alex. Cameron, Jr., N. P.

The De La Vergne Refrigerating Machine Co., foot of East 138th St.

(Dictated.)

NEW YORK, April 28, 1891.

Mr. R. E. Jenkins, 89 E. Madison St., Chicago, Ill.

MY DEAR SIR: Your favors of 22nd inst. were received; also enclosures consisting of list of creditors and copies of correspondence.

Note that the amount stated in the memo. you gave me does not include counsel fees and disbursements. Could you give me

331 an idea what these counsel fees are likely to amount to and what counsel have been employed? I make these inquiries

for the purpose of being able to approximate pretty soon how the business will come out, not for the purpose of being in any way too close about the matter; but you know the nearer I can come to

accurate figures the more readily and quickly I can determine what course to pursue.

Have been pushing very actively all last week and so far this in the investigation of the various cases. I am going to Trenton on Thursday to look over the plant there.

Yours very truly,

J. C. DE LA VERGNE.

Ex. 18. November 11th, 1896. W. H. M. Alex. Cameron, Jr.,
N. P.

The De La Vergne Refrigerating Machine Co., foot of East 138th St.

(Dictated.)

NEW YORK, June 3rd, 1891.

R. E. Jenkins, Esq., 89 East Madison St., Chicago, Ill.

DEAR SIR: Yours of May 29th enclosing copies of the letters received by you from Ernest H. Davis, attorney for the Consolidated Ice Manufacturing Co., Philadelphia, and S. W. Curriden, treasurer of the Hygienic Ice Co., Washington, as well as copies of your replies to same, were duly received. Both these companies had previously sent us a copy of their letter to you.

We have read all the letters carefully and do not see that we can suggest anything further just at present, for you seem to have handled the matters in your replies about as we would have done.

Mr. Waters has kept the writer posted about the compromise matters in Chicago and the "kick" which some of the creditors are trying to make against you.

I expect to see Mr. R. C. Crane this evening at the 5th Ave. hotel here.

Yours very truly,

J. C. DE LA VERGNE.

Ex. 19. New York, November 11, 1896. W. H. M. Alex. Cameron,
Jr., N. P.

Telegram.

Dated Port Morris, N. Y. 21.

To R. E. Jenkins, 89 Madison St., Chicago, Ill:

Have been out of town since Friday. Am inclined to think that I would accept steam company's offer as per your letter of July fifteenth.

JOHN C. DE LA VERGNE.

332 Ex. 20. New York, November 11th, 1896. W. H. M. Alex.
Cameron, Jr., N. P.

The De La Vergne Refrigerating Machine Co., foot of East 138 St.

NEW YORK, July 22nd, 1891.

Mr. R. E. Jenkins, Chicago, Ill.

DEAR SIR: Our Mr. De La Vergne telegraphed you yesterday as follows: "Have been out of town since Friday. Am inclined to

think I would accept steam company's offer as per your letter of July 15th," which we now confirm.

Yours very truly,

THE DE LA VERGNE REFRIGERATING
MACHINE COMPANY,
By LOUIS BARON.

Relates to offer New York Steam Co.

Ex. 21. New York, November 11th, 1896. W. H. M. Alex.
Cameron, Jr., N. P.

The De La Vergne Refrigerating Machine Co., foot of East 138th St.

(Dictated.)

NEW YORK, Oct'r 12, 1891.

Mr. Robert E. Jenkins, Chicago, Ill.

DEAR SIR: Your favor of the 7th instant was received by me this morning, after an absence of several days from my office, and I note what you say in respect to the commencement of suit for damages. I must decline to withdraw the notices of infringement under the Boyle patent, for reasons which are more fully explained in a letter to Messrs. Banning & Banning & Payson, a copy of which I herewith enclose. The notices having been sent out by the attorney of this company after investigation of the subject, you cannot expect me to withdraw them, or to decline to follow the matter up to a final decision, if it becomes necessary for me to do so.

Yours very respectfully,

JOHN C. DE LA VERGNE, *Pres't.*

(Dictated.)

OCTOBER 12, 1891.

Messrs. Banning & Banning & Payson, No. 225 Dearborn St.,
Chicago, Ill.

GENTLEMEN: Answering yours of Saturday, I have received the letter from Mr. Jenkins, assignee, threatening suit for damages, etc., which you mentioned. I wish you would call upon Mr. Jenkins, and tell him that the notices were sent out in good faith, and that I must therefore decline to withdraw them, or waive right under the Boyle patent.

333 As showing my confidence in the matter I am perfectly willing to begin suits against all users of the Consolidated machines referred to in the notices, and then to select one suit in which to test all the questions—this selection to be made by counsel for defendant and for Mr. Jenkins, and for my company; the test suit to be carried forward to a final decision, on the merits, as speedily as practicable. My reason for desiring to begin all the suits at once is that a court of equity will not have jurisdiction unless the bills are filed a reasonable time before the expiration of a patent. This makes it necessary to file them in the near future, but of course if a test suit is selected all the other cases may be allowed to remain

in abeyance, so as not to make any unnecessary trouble or expense until a final decision in the test suit can be obtained.

As you know I have preferred to work harmoniously with Mr. Jenkins, believing that such course would be to our mutual benefit; but I cannot think of doing so except on a basis that will at least promise a fair return for the rights which I will have to relinquish in aiding him to make (*recollections*).

I have taken legal advice on the questions involved, and the fact that the Boyle patent is clearly infringed certainly entitles me to insist upon the benefit of its claims, or at least an adjudication of my rights under them. So far as my knowledge goes the question of validity has never been passed upon, and no court has ever decided several of the questions which will probably be raised.

As to bidding for the Consolidated Ice Machine Company's plant I cannot see how it will be to my advantage to acquire such plant, especially in view of the unsatisfactory condition in which everything now stands. I am unwilling to buy any more lawsuits; but I would not be averse to an arrangement which will settle the infringement claims, and end my whole connection with the matter. I wish you would call upon Mr. Jenkins, and confer with him so that some definite plan of action may be determined at an early date.

Yours very truly,
(Signed) JOHN C. DE LA VERGNE, *Pres't.*

Ex. 22. New York, November 11th, 1896. W. H. M. Alex. Cameron, Jr., N. P.

CHICAGO, *April 18th*, 1891.

John C. De La Vergne, Esq.

DEAR SIR: In reference to the matter of compensation, I am disposed to say that for services rendered company (—) the first of this month, I think I should be allowed \$5,000, and for services 334 to be rendered until the (month) is closed up, provided the time does not extend beyond Jan. 1, 1892, I think the further sum of \$5,000 would be about right.

I put the thing in this way because it is impossible to say as to the future how much of time and responsibility may be involved. I presume that less and less time will be necessary from month to month.

Truly yours,

R. E. JENKINS.

CHICAGO, *April 18th*, 1891.

To all parties having unsettled contracts with the Consolidated Ice Machine Company of Chicago.

GENTLEMEN: I have consulted with Mr. John C. De La Vergne of the De La Vergne Refrigerating Machine Company with reference to our plants and unfinished contracts and settlements to be made, and have asked him for advice in these matters. He wishes to visit the plants with a view to seeing whether in his opinion we have complied with our contracts, and as to their general condition.

Please confer with him fully in reference to these matters, and state to him your view with reference to the machines and plants erected for you.

Truly yours,

R. E. JENKINS,
Assignee of the C. I. M. Co.

CHICAGO, April 21st, 1891.

John C. De La Vergne, Esq., foot 138th street, New York.

DEAR SIR: In reply to your telegram of yesterday, I send you herewith copies of recent letters concerning the New York Steam Company, and the Trenton plant. You have a copy of the last letter from the Consumers' of New York. These are the letters we had before us when you were here. My answer to the Trenton Company was that if they would pay us one-half the balance due on contract now, we would be willing to accommodate them as to time of trial run, and I requested them to send me a list of what they claim as deficiencies. I have had no reply as yet to this letter.

The answer to the Consumers' Company of New York was in substance a denial of their claims, and a request for a more specific statement. This we have not received.

I have no recent correspondence with the two plants at Philadelphia. The principal trouble at the Consumers' plant is a claim by them that the consumption of coal is in excess of the amount guaranteed by contract.

We ought not to have any trouble at the Philadelphia cold-storage plant. They delayed us many months in the prosecution of the work. I do not know how they feel with reference to this matter, as I have had no negotiations as yet with them with reference to settlement.

335 I will send you a list of creditors with addresses, as soon as it can be copied, probably tomorrow.

At the conference of creditors yesterday, of which mention was made when you were here, there was nothing said with reference to compromise or settlement of claims, but the situation of contracts was talked over very much as with you, and the desire was expressed that I take steps as soon as possible to sell the machinery, patterns, drawings, etc., which constitute our manufacturing plant here. This I have had in prospect for some time, as we are nearly through with our work. I presume I shall advertise it for sale in a few days.

Truly yours,

R. E. JENKINS.

(Ans. Ap'l 28, '91.)

CHICAGO, April 22, 1891.

John C. De La Vergne, Esq., foot of E. 138th St., New York.

DEAR SIR: Yours 20th inst. at hand. I thought we fully understood each other when we discussed the matter of compensation. The mem. I gave you did not include any "counsel fees and disbursements." It referred solely to my personal compensation. I meant to make the items reasonable, and think they are. Of course,

as I said to you in reference to second item, if a speedy settlement is reached, I will try to adjust that to your satisfaction.

To properly answer your second letter of same date, I shall have to make up practically an inventory of estate as it now is. This will require a few days. I have several thousand dollars unpaid bills for merchandise. I hope to have funds enough by 28th inst. to pay all these. I will make up statement as well as I can and try to send you early next week.

Truly yours,

R. E. JENKINS.

(Ans. Ap'l 28, '91.)

CHICAGO, April 22, 1891.

John C. De La Vergne, Esq., New York.

DEAR SIR: I enclose list of creditors as requested. There are some corrections to be made in some of these claims, hence it is not "footed." These are all the affidavits in support of claims and first the amount claimed by the creditors. It is not probable that the corrections will reduce the total more than one or two thousand dollars.

If I learn anything as to the disposition of creditors, or any of them to dispose of their claims at a discount, will advise you.

Truly yours,

R. E. JENKINS.

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CHICAGO, April 29th, 1891.

John C. De La Vergne, foot 138th street, New York.

DEAR SIR: Your telegram received last evening, and I herewith enclose you copy of letter from Gov. Abbett, attorney for the Trenton people. It had occurred to me that you would be at Trenton, and would see them before I could send you a copy and that you would not want it, hence I did not send it. I will send you copies of important letters relating to these plants hereafter at once. I did not know that our men at Trenton were selling ice, and have written to inquire with reference to the matter. As to the defects mentioned, I was aware of the condition of the boiler settings as you know. I do not know as to the other matters, but presume that from your examination you can speak as to them. I shall be glad to have your views of the situation, as to this plant, and the others you have examined as soon as possible.

Truly yours,

R. E. JENKINS.

Ans. May 2, '91.

CHICAGO, April 30th, 1891.

J. C. De La Vergne, Esq., foot of East 138th St., New York.

DEAR SIR: I have yours with two enclosures of 28th inst. Creditors here are very desirous that action be taken with reference to the sale of plant. Several of them have called on me since my former letter to you. If you report on our various eastern contracts can be mailed by Saturday, so as to reach me Monday, if not before, I shall be glad. If you do not get it mailed Saturday, hold it unless I write this week. I think I shall go East myself so as to act

promptly in some of these matters. I will endeavor to give you then what facts I can with reference to the matter of counsel fees, and other expenses. I think this is perhaps better than to attempt to make up a statement, for which I am not quite ready. I hope you will be in New York next week, so that I can see you personally and consult with you fully. As to counsel, I have employed but one attorney here, Mr. Kitchen in New York and Mr. Rassieur in St. Louis. The two latter are substantially paid up. The unpaid bills will be small. As to the other, I will set about it before I leave.

Truly yours,

R. E. JENKINS.

CHICAGO, May 23rd, 1891.

John C. De La Vergne, foot 138th street, New York.

DEAR SIR: I have today your statement regarding the Washington plant, for which I am much obliged. Please let me have the propositions you may receive from the Consumers' at 337 Philadelphia, or the Washington people. If they come to me, I will forward you copies at once.

I find on coming home, that the creditors here are considerably stirred up. The Crane Company and the Featherstone have brought suits to get judgment against the company, and other small creditors have fallen in and are doing the same. A number of them have called upon me, and I have stated to them the present condition of affairs. I do not know what their disposition will be in the matter of the settlement; but Mr. Waters will find them in a tolerably belligerent attitude at the start.

I do not know whether you expressed your idea regarding the proposition of the Consumers' in New York to pay \$40,000 cash. I should like to have your views in the matter.

Truly yours,

R. E. JENKINS.

CHICAGO, May 21st, 1891.

J. C. De La Vergne, Esq., foot East 138th St., New York.

DEAR SIR: I was in Pittsburgh yesterday, and found plant in tolerably satisfactory condition. In the morning when I was there occasional cakes of ice had something in the top supposed to be oil, and also occasional cakes had some discoloration at bottom. This was troubling the company. In the afternoon and evening I was there twice, and the ice was running clear. I was told by the secretary of the company that there had been this irregularity in quality, and that the ice would run good for some time and then there would be some trouble. I instructed Becker to remain there and watch the production, and if there should be any further trouble at the bottom of the cakes to get a small bottle of the water from the corrupted portions and mail it to you in order that your chemist might analyze it to see what the trouble was. In the evening just before I came away the water filled into the cans seemed to have a milky, whitish color. This was a surprise to everybody there, I am anxious to hear whether it continues and as to what kind of ice will be drawn from those cans. I instructed Becker to write just as

soon as they reached them, and to report also whether this peculiar coloring of the water continues. The people there seem to be well pleased, and I apprehend there will not be much if any loss in settlement. No test is provided for in the contract, but the company is to make settlement whenever they are satisfied that the contract is complied with. If we can get the ice to run perfectly clear,

338 I think they will be ready to settle. There are some small leaks in some of the tanks and filters, which I instructed Becker to attend to.

I am just home today, and drop you this report.

Truly yours,

R. E. JENKINS.

(Ans. by telegram July 21, 1891. L. B.)

Telegram confirmed by letter July 22, '91.

CHICAGO, *July 15th*, 1891.

J. C. De La Vergne, Esq., New York city.

DEAR SIR: I have a telegram this morning from Mr. Kitchen, which is as follows:

"Steam company offer thirty thousand, eighteen four months' note, date from end of test, twelve thirty days, plead no cash on hand."

I write you as you are somewhat familiar with the condition of affairs at that plant, and are so largely interested in the outcome, to ask your advice in the premises. The contract in this case provided:

"We agree to have this machine erected complete and in full operation under the supervision of our engineer in charge, by or before July 16th, 1890, under forfeiture of thirty dollars (\$30.00) per day for the first 15 days, and of fifty dollars (\$50) per day for the next 15 days, and one hundred dollars (\$100.00) per day for each succeeding day."

I think the offer as to amount is as large as we could have expected. This is the case in which last November they claimed the penalties amounted at that time to \$9,000, and I have expected that we should have to stand a loss of (*that*) least from \$10,000 to \$15,000 on that contract. I think Mr. Kitchen has done well in the negotiations which have been carried on so far. I am however, doubtful of the solvency of the steam company, and of Mr. Andrews, its president. I have written Kitchen to negotiate for better terms, and meantime would like your advice in the premises.

Truly yours,

R. E. JENKINS.

Ex. 23. New York, Nov. 11, 1896. W. H. M. Alex. Cameron, Jr.,
N. P.

Received July 8, '91.]

Office of John R. Waters, 86 Worth street.

NEW YORK, 1st July, 1891.

The De La Vergne Refrigerating Machine Co. Dr. to John R.
Waters.

In the Matter of THE CONSOLIDATED ICE MACHINE Co., Insolvent.

For personal services to date:

17 days in May

23 " " June

40 days to end of June, 1891, at \$25..... \$1,000.00

Received payment, \$1,000.

JOHN R. WATERS.

New York, 22 July, 1891.

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Received July 8, 1891.

NEW YORK, 1st July, 1891.

The De La Vergne Refrigerating Machine Co. Dr. to John R.
Waters.

In the Matter of THE CONSOLIDATED ICE MACHINE Co., Insolvent.

For out-of-pocket expenses to date:

J. R. Waters, trip to Chicago and St. Louis.....	150.73
J. R. Waters, second trip to Chicago.....	213.46
W. H. Handy, trips to Philadelphia and Pittsburgh.....	69.73
J. R. Waters, car fares in New York & Brooklyn.....	6.15
W. H. Handy, car fares in New York and vicinity.....	14.07
Stationery.....	4.30
Printing.....	19.50
Postages in New York.....	20.00
Telegrams in New York.....	3.58
Messenger service in New York.....	.50
Time of W. H. Hancy in May and June 35 days at \$6....	210.00

712.02

Less received on account..... 250.00

\$462.02

Itemized account annexed.

Received payment, \$462.02.

JNO. R. WATERS.

22nd July, 1891.

Received July 8, 1891.

NEW YORK, 1st July, 1891.

Traveling expenses of John R. Waters to, at and from Chicago and St. Louis in the matter of the Consolidated Ice Machine Co., 23rd May to 6th June, 1891.

23-24.	(Mat), R. R. fare, N. Y. to Chicago.....	25.00	
	Sleeper.....	3.00	
	3 meals on train \$3, waiters .30.....	3.00	
	Sleeping-car porter.....	.25	
	Bus to Tremont house, Chicago.....	.50	
		<hr/>	32.05
24 May/3 June	in Chicago:		
	10 days' board at 3.50.....	35.00	
	Boots .10 and table waiters .20 10 days.....	3.00	
	Cab hire 19 hours.....	19.00	
	Street-car fares.....	4.05	
	Telegrams and postages.....	3.28	
		<hr/>	64.33
3 June.	R. R. fare, Chicago to St. Louis.....	7.50	
	Sleeper, ".....	2.00	
	Bus to depot.....	.50	
4 June.	Sleeping-car porter.....	.25	
	Bus to Southern hotel.....	.50	
		<hr/>	10.75
340	In St. Louis:		
	1 day board.....	4.50	
	Lunch to Mr. Rassieur.....	2.40	
	Street-car fares.....	.35	
5 June.	Breakfast.....	1.00	
	Boots and table waiters.....	.50	
		<hr/>	8.75
	R. R. fare, St. Louis to N. Y.....	23.50	
	Sleeper.....	6.00	
	Sleeping-car porter.....	.40	
	4 meals on train \$4, waiters .40.....	4.40	
6 June.	Car fare and expressage in N. Y.....		34.85
		<hr/>	150.73

NEW YORK, 1st July, 1891.

Traveling expenses of John R. Waters to, at and from Chicago in the matter of the Consolidated Ice Machine Co., 13 June to 1st July, 1891.

Fare and sleeper from New York.....	\$25.00
3 meals on cars, 3.00, waiter .30.....	3.30
Porter .25, bus to hotel .50.....	.75
Wellington hotel, room 16 days.....	32.00
Wellington hotel, restaurant.....	48.00
Wellington hotel, waiters.....	4.80
Wellington hotel, (bott's).....	1.60
Telegrams to N. Y. and elsewhere.....	44.21
Typewriting in Chicago.....	6.80
Car fare and messenger service.....	14.25
Postage stamps.....	1.20
Fare and sleeper to New York.....	28.00
3 meals on cars, 3.00, waiter .30.....	3.30
Sleeping-car porter.....	.25

\$213.46

NEW YORK, 1st July, 1891.

Traveling expenses of W. H. Handy to, at and from Philadelphia and Pittsburgh in the matter of the Consolidated Ice Machine Co., 1st June to 11th June, 1891.

Fare and sleeper from New York.....	\$16.90
Bus to hotels.....	.55
Car fares.....	2.23
Meals.....	3.65
Telegrams.....	.25
Expressage.....	.50
Hotels.....	28.75
Fare and sleeper to New York.....	16.90
	<hr/>
	\$69.73

341 Ex. 24. Received August 28th, 1891. November 11th, 1896.
W. H. M. Alex. Cameron, Jr., N. P.

Office of John R. Waters, 86 Worth St.

NEW YORK, 26th Aug., 1891.

The De La Vergne Refrigerating Machine Co. Dr. to John R. Waters.

In the Matter of THE CONSOLIDATED ICE MACHINE CO., Insolvent.

Personal services in August, 5 days..... \$125.00
Out-of-pocket expenses at New York, in July and

August:

Telegrams.....	\$2.79
Printing.....	1.50
Car fares.....	.15
	<hr/>
	4.44

	<hr/>	\$129.44
Bills rendered 21st July.....	96.80	
1st Aug.....	600.00	
6th Aug.....	125.90	
	<hr/>	822.70
		<hr/>
		\$952.14

O. K. No. 5758, Aug. 29, '91. F. B.

Received August 8th, 1891.NEW YORK, 6th August, 1891.

The De La Vergne Refrigerating Machine Co., Dr. to John R. Waters.

In the Matter of THE CONSOLIDATED ICE MACHINE CO., Insolvent.

Traveling Expenses of John R. Waters to, at, and from Chicago, 25th July to 5th August, 1891, Fourth Trip.

R. R. fare and berth, \$28.00 each way	\$56.00
7 meals on cars, \$7, waiters, .70	7.70
Sleeping-car porters, .50, busses, 1.00	1.50
Wellington hotel, room 8 days	16.00
" " restaurant	24.00
" " waiters	2.40
" " boots .....	.80
Car fares and messenger service, Chicago	3.75
Telegrams and postages, Chicago .....	.75
Typewriting on bids .....	.75
Trip to Geneva Lake, Wis., and back to see Mr. Crane, of Crane Co.	5.25
Extra lunches to Mr. Valentine, of Armour & Co., and others (financial)	7.00
	<hr/>
	\$125.90
Bills rendered	696.80
	<hr/>
	\$822.70

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NEW YORK, 1st Aug., 1891.

The De La Vergne Refrigerating Machine Co., Dr., to John R. Waters.

In the Matter of THE CONSOLIDATED ICE MACHINE CO., Insolvent.

For personal services in July :

24 days, at \$25	\$600.00
Bill rendered 21 st July, '91	96.80
	<hr/>
	\$696.80

Received July 22, 1891.

NEW YORK, 21st July, 1891.

The De La Vergne Refrigerating Machine Co., Dr., to John R. Waters.

In the Matter of THE CONSOLIDATED ICE MACHINE Co., Insolvent.

Traveling Expenses of John R. Waters to, at, and from Chicago, 11th to 18th of July, 1891, Third Trip.

R. R. fare and berth \$28 each way.....	\$56.00
7 meals on cars \$7, waiters \$.70.....	7.70
Sleeping-car porters \$.50, busses \$1.00....	1.50
Wellington hotel, rooms 5 days	10.00
" " restaurant	15.00
" " waiters.....	1.50
" " boots .....	.50
Car fares and messenger service, Chicago	4.20
Postage stamps, Chicago.....	.40

\$96.80

Bills rendered..... 1,712.02

Paid.

\$1,808.82Less received on account 250.00 |

Balance due \$1,558.82

Statement for personal services in July will be rendered at end of month.

Received August 28th, 1891.

Charles H. Cone, Esq., secretary, foot East 138th St., New York city.

MY DEAR SIR: Unless something not now in sight should develop, the enclosed memo. will be final in so far as concerns my expenses in the matter of the Consolidated Ice Machine Co.

It will assist me in money matters if you can conveniently send check this week.

Yours truly,

JNO. R. WATERS.

343 Ex. 25. New York, November 11th, 1896. W. H. M. Alex. Cameron, Jr.,
N. P.

NEW YORK, —, 189—.

R. E. Jenkins, assignee, in account with the De La Vergne Refrigerating Machine Co., foot of East 138th street.

1891.

May 13.	To cash Koenigsberg.....	40.00
20.	" " ".....	15.00
29.	" cash, expenses, Koenigsberg	15.00
June 1.	" cash Koenigsberg.....	197 10
1.	" cash L. Howard Jenks.....	150.00
1.	" cash Thos. H. Hughes.....	166.66
4.	" cash Koenigsberg.....	40.00
5.	" cash do.....	} 83.34
	extra compensation Thos. H. Hughes.....	

19.	"	invoice	3.43	
26.	"	cash expense Koenigsberg	32.50	
30.	"	" Koenigsberg—June salary	44.44	
30.	"	" expense—Hughes	83.33	
30.	"	" office rent, July	25.00	
30.	"	" L. Howard Jenks	105.00	
30.	"	" T. E. Hughes, June salary	149.98	
24.	"	" freight from Con. Ice M. Co.	62.07	
3.	"	" expense—Koenigsberg	15.00	
30.	"	" invoice	5.85	
Aug. 31.	"	"	284.20	
4.	"	" exp. T. E. Hughes	83.33	
4.	"	" office rent Aug.	25.00	
4.	"	" L. H. Jenks, July salary	84.50	
4.	"	" T. E. Hughes	132.00	
Sept. 3.	"	" Hughes, Aug. salary	91.85	
Oct. 1.	"	" Sept. "	16.70	
1892.				
Jan. 30.	"	" exp. Koenigsberg	4.80	
				1,956.08
		Amount forward		1,956.08
1891.				
Aug. 31.	By	July rent	25.00	
31.	By	transfer from Consolidated Co	167.98	
				477.18
				1,478.90
1891.		Cr.		
July 18.	By	cash		9.28
				1,469.62
		Cr.		
1895.				
Oct. 18.	By	cash		1,400.00
				69.62

Ex. 26. New York, November 11th, 1896. Alex. Cameron, Jr.,
N. P.

The De La Vergne Refrigerating Machine Co., foot of East 138th St.
New York, July 10, 1891.

John H. Von Der Horst, Esq., Baltimore, Md.

DEAR SIR: The capital stock of the De La Vergne Refrigerating
Machine Company is \$2,000,000; \$1,400,000 of this stock is owned
as follows:

344	John C. De La Vergne	12,400 shares.
	Carl H. Schultz	1,000 "
	Catherine A. De La Vergne	240 "
	Adolf Bender	160 "
	Dr. A. C. Rhoades	88 "
	Jacob Ruppert	44 "
	John V. Rhoades	22 "
	John G. Gillig	20 "
	Hon. Ashbel P. Fitch	4 "
	Louis Block	4 "
	Louis E. De La Vergne	4 "
	Charles H. Cone	4 "
		14,000 "

The assets of the company on the first of July, 1890, were \$1,385.90, and the profits for the year ending June 30th, 1891, are estimated at 300.00 (the books for the year ending June 30th, 1891, have not yet been closed) making the total assets \$1,685,188.90. This shows a surplus of \$285,188.90.

The board of trustees of the company have for some time been considering the (*property*) of offering the \$60,000 worth of stock still in the treasury to new subscribers, and in doing this they deem it decidedly preferable to have these subscriptions taken up among the customers of the company and other users of refrigerating machines, and are at present only offering it to such of their friends. The money received for this stock will be used for building an additional erecting shop and foundry on the lands already owned by the company, plans for which are now completed, and also for additional working capital; thus enabling the company to make its own castings, and also to build its steam-engines. For both these branches of its work it has heretofore employed other foundries and machine shops. The company believes that this will considerably increase its profits, and more than justify the expenditure.

Of the \$600,000 treasury stock Mr. Jacob Ruppert, of New York, has already subscribed \$55,600 which, with his present holdings, makes \$60,000 worth of stock, and Mr. George Elret, of New York, has subscribed for \$60,000 worth.

We would be very glad if you will inform us whether or not you would be willing to subscribe for any portion of the stock, and if so, for how much. There is no doubt of its being a good-paying investment, and the stock should be rapidly taken up.

The affairs of the company will be open to you at any time
345 at its office for any investigation you would like to make, or if you desire it, the president or other officer of the company will call on you.

Yours very truly,

THE DE LA CERGNE REFRIGERATING
MACHINE CO.

JOHN C. DE LA VERGNE, *Pres't.*

NEW YORK EXHIBIT # 26a. November 12th, 1896. Alexander Cameron, Jr., N. P.

	Consolidated Co.'s estimate of value of each asset as fol- lows :	H. W. Guernsey's estimate of value of each asset as follows :	April 20, 1870, J. Koenigsberg's es- timate of am't due.
Cash.....	12,343.85	12,343.85	
Cons. Ice Co. stock (of Chicago).....	5,000.	5,000.	
World's Fair stock.....	200.	200.	
Acc'ts receivable.....	25,502.74	19,127.06	
Darley Park brewery (Baltimore).....	15,340.55	14,000.	
Jos. Ebner, Vincennes, Ind.....	8,000.	8,000.	
Hygienic Ice Co., Washington, D. C.....	17,482.75	12,000.	17,000
Phila. Warehouse & Cold Storage Co.....	71,800.	65,000.	73,500
Union Ice Mfg. Co., Pittsburgh, Pa.....	35,631.50	35,631.50	36,000
International Packing Co., Chicago.....	8,143.19	8,143.19	
A. Winttet & Co., Bridgeport, Ct.....	2,300.	2,000.	2,000
Trenton Hygienic Ice Co.....	75,000.	60,000.	92,000
Consumers' " " " New York.....	56,000.	56,000.	54,000
Do. Pure Ice Co., Chicago.....	39,000.	34,000.	40,000
New York Steam Co.....	34,000.	27,500.	42,000
Quincy Machet Cold Storage Co., Boston..	16,372.46	16,372.46	17,000
Consumers' Ice Mfg. Co., Philadelphia.....	21,000.	18,000.	21,125
Consumers' Ice Co., Chester, Pa.....	19,500.	16,000.	
Paul Weidmann, Brooklyn, N. Y.....	13,125.	13,125.	
Anthony & Kuhn, St. Louis, Mo.....	3,000.	3,000.	
Fulton Ave. brewery, Evansville, Ind.....	15,000.	12,000.	10,000
Midland Hotel Co.....	4,183.79	1,500.	6,000
			Less 3,000
Machines in shop partly built as follows :			
75-ton horizontal machines.....	5,405.80	5,405.80	
75 " vertical do.....	1,398.14	1,398.14	
25 " horizontal do.....	840.15	840.15	
60 " ice do.....	1,500.17	1,500.17	
150 " " do.....	2,924.84	2,924.84	
35 " vertical do.....	399.19	399.19	
Charges ag't unfinished contracts as fol- lows :			
Toledo Brewing & Malting Co., Toledo, O..	7,889.77	7,889.77	18,000
Joseph Doelger's Sons, New York.....	8,309.67	8,309.67	20,600
Paul Schoenhofen Br'g Co.....	558.16	558.16	15,500
A. Tilger & Co., Duluth.....	501.93	501.93	12,000
Tennessee Brewing Co., Memphis.....	365.67	365.67	25,500
Eagle Brewing Co., Jersey City.....	7,980.04	7,980.04	19,500
Merchandise.....	76,509.18	57,381.89	
Bills receivable.....	22,185.54	22,185.54	
Tool account, as per accompanying inven- tory.....	3,439.97	3,439.97	
Machinery account.....	46,137.56	46,137.56	
Patterns ".....	17,693.80	None.	
Drawings ".....	12,383.18	None.	
Office furniture, Chicago and New York...	2,015.39	1,000.	
Equity on unfinished contracts as per ac- companying estimate in detail.....	28,000.00	28,000.	
	744,898.98	635,161.55	521,775
Conrad Seipp Brewing Co., Chicago, Ill...			12,500
			534,275

Liabilities.

	Consolidated Co.'s estimate.	H.W. Guern- sey's estimate.
Acc'ts payable	181,868.98	181,868.98
Bills do.	362,916.74	362,916.74
Salary acc't.	3,505.58	3,505.58
Leo. Nassien, cash, 13,000, services, 4,691.15..	17,691.15	17,691.15
Estimated cost to complete contracts, full am'ts of which have been charged to per- sonal acc'ts and appear in acc'ts receivable..	15,350.00	25,000.00
	<u>581,332.24</u>	<u>590,982.45</u>
Assets.....	744,898.98	635,161.55
	<u>581,332.45</u>	<u>590,982.45</u>
	163,566.53	44,179.10

Capital stock \$100,000

Divided as follows:

J. W. Schurble	25,000
L. Nassien	20,000
Anna Jaugenfeld... ..	7,000
Jaugenfeld & Nassen, trustees for Jaugenfeld.....	7,000
Sophia Saude.....	7,000
E. Jaugenfeld est....	9,000
E. Mollniehead.....	22,500
L. Nassien and P. J. Jaugenfeld, ex'rs of E. Jaugenfeld est.	2,500
	<u>100,000</u>

NEW YORK EXHIBIT No. 27. November 12th, 1896. Alex. Cam-
eron, Jr., N. P.

Leo Rassieur.

B. Schnurmacher.

Rassieur & Schnurmacher, attorneys-at-law, rooms 203, 204, & 205,
Granite building, S. W. cor. 4th and Market streets.

St. Louis, July 15th, 1891.

John C. De La Vergne, Esq., Port Morris, New York city, N. Y.

DEAR SIR: Your telegram informing me that you had written with reference to patents came to hand in due time, but no matter was received this morning as I expected. Yesterday I saw Mr. Meyer who is anxious to purchase the patents concerning which I wrote you, and who has been acting through Knight Bros., patent agents, whose bid I communicated to you, and I then learned that he supposed that he was also bidding on letters patent number 265,123, on an apparatus for cooling beer, which patent is also held by the Empire Ref. Co. Upon receipt of this letter please telegraph me the price you will give for the patent to which I have just

referred you, and copy of which I herewith enclose, I would
 347 also thank you to telegraph your highest figure for the three
 patents to your agent Mr. Ruemmeli, with instructions to
 call upon me with reference to the purchase of the same. Mr.
 Meyer is here and hot after the patents, and I desire to obtain the
 highest price for them, and hence feel that I cannot permit him to
 leave without giving him an opportunity of making the best bid
 which he can make.

Mr. Waters has written me and explained how the circulars came
 to be sent to the German savings inst. and other secured creditors
 in this city. His explanation is satisfactory, and I have today
 mailed to him at Chicago, my present firm's signature to the com-
 position agreement. He deems the signature necessary and valu-
 able in order to enable him to obtain other signatures at Chicago.

In order to close up the estate of Edmun- Jungenfeld, deceased,
 it is necessary that I should have the certificate of stock to which
 the estate is entitled. The time for forwarding the same, having
 already expired, may I urge you to forward same by return of
 mail?

Yours very truly,

LEO RASSIEUR.

NEW YORK EXHIBIT No. 28. November 12th, 1896. Alex. Cam-
 eron, Jr., N. P.

(Telegram.)

(Copy.)

JULY 18TH, 1891.

To Leo Rassieur, Granite bldg., 4th & Market streets, St. Louis,
 Mo.:

Yours of the 15th to Mr. De La Vergne just received. Mr. De
 La Vergne out of town. Will be back Tuesday. Please hold pat-
 ent matters open till you hear from him. Wrote you on thirteenth
 about two patents.

D. R. M. CO.

EXHIBIT No. 29. New York, November 12th, 1896. New Taxes Exhibit. Alex.
 Cameron, Jr., N. P.

J. Koenigsberg.

1891.		
" 30.	Interest on \$1,200.00 from May 5/91 to Aug. 6/91	
Nov. 30.	Interest	31.34
" 30.	Dict. of Featherstone note	600.00
	at 6%	18.60
" 30.	Interest on 600.00 from Aug. 6/91 to Nov. 28/91 at	
	6%	11.40
" 28.	Check on account	2,306.16
1892.		
Feb. 17.	To check to take up draft of John Featherstone Sons	
	for payment due on machine to Reading Cold Stor-	
	age Company	3,000.00
" 23.	To check to take up draft of Featherstone's Sons for	
	payment due Bavarian Br'g Company Mach.	2,420.67

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M'ch 10.	To ck. 1st payment Featherstone job 349c.....	1,723.23
" 10.	To ck. 1st payment " job 337c.....	2,420.67
May 5.	To ck. to meet Featherstone d'ft due May 7.....	1,718.33
" 5.	To cash from John Eichler Br'g Co.....	925.00
" 5.	To cash from Reading C. S. Co.....	1,200.00
" 5.	To cash from John Kress Br'g Co.....	1,000.00
" 26.	To ck. bal. due on 2-35-ton Featherstone machine for Reading S. C. Co., 9,900.00.....	813.69
" 26.	(To) Koenigsberg had an option of time on 6,900.00 bal. due Featherstone on the 2-35-ton machine for Reading, but which bal. he settled in cash.	
	Int. on a 60-day note for 3,450.00.....	34.56
	Int. on a 90-day note for 3,450.00.....	51.75
		86.31
" 26.	To note of Reading Cold Storage Co., dated May 25th, due July 27th.....	6,000.00
	To amount forward.....	24,275.50
	To amount forward.....	24,275.50

1892.

July 28.	To check take up d'ft on Featherstone Sons.....	8,358.34
15.	To notes of Ph. & Wm. Ebling Brewing Co., as viz:	
	Due Sept. 17/92.....	2,625.00
	Due Oct. 17/92.....	2,625.00
		5,250.00

Above notes made to order of Jos. Koenigsberg and endorsed by him to J. Featherstone Sons.

Oct. 14.	To Jos. Koenigsberg rec'd for 200 shares of stock at 50.00 ea. of P. P. & P. Co. from Hughes, Cook & Co. on their notes.....	7,500.00
	And H. C. & Co. are to pay J. K. when the trial run has been made at the P. P. & P. Co.....	2,500.00
		10,000.00
	J. K. has paid to Featherstone & Sons in full of balance due for these two machines at the P. P. & P. Co. as per Featherstone & Sons' receipt, dated Oct. 14/92 on file.....	9,682.67
	And will pay to us when the trial run has been made.	317.33

1893.

Ap'l 1.	To amount of repairs to be made by John Featherstone's Sons on Reading machines deducted from settlement of July 28/92 of Featherstone's ac. by J. Koenigsberg as per statement on file amount due Featherstones.....	14,108.34
	Bill rec.....	5,250.00
	Draft.....	8,358.34
	Above.....	500.00
		14,108.34 500.00
	To amount forward.....	48,383.84
	To amount forward.....	48,383.84

1891.

Cr.

Nov. 30.	By India Wharf Blen order Featherstone Sons, due Jan. 28/92.....	2,937.50
" 30.	" disc't on May 5th of his note for \$1,200 due July 31st, which was ch'g'd to him on loan ac. Same should have been ch'g'd to interest ac. as we ch'ge Koenigsberg the entire interest amounting to 30.00, as per jo'n'l fol. No. 218.....	17.40
Dec. 15.	" cash bal. of interest.....	12.60

1892.

May 25.	" two 35-ton Consolidated machines Feb. 3rd, built by Featherstone. See statement attached to K.'s letter of May 23 in Mr. Cone's possession, job 336c, C. B. T. No. 570.....	9,900.00
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June 30.	By invoice Featherstone M.....	7,262.00	
" "	" " " ".....	7,262.00	
" "	" " " ".....	4,950.00	
			33,998.00
" 30.	" " of Featherstone's Sons against J. Koenigsberg, dated May 27/92.....	1,199.01	
			48,064.51

1896.	Dr.		319.33
May 8.	To cash advanced ac. note Cook.....	147.45	
" "	" " disc't on note.....	1.45	
" "	" " balance in cash.....	1.10	
			150.00
	To amount forward.....		469.33
	To amount forward.....		469.33

1896.	Ch.		
Feb. 14.	By interest on notes Hewes & Cook, dated Oct. 11/92, at 4 mos. for 10,000.00, negotiated by Jos. Koenigsberg for ac. of the Philada. Packing & Prov'n Co., and proceeds to us, same was afterwards renewed..	319.33	
Ap'l 30.	By note Hugh Cook & Co.....	150.00	
			469.33
	J. Koenigsberg (personal ac.).		

1892.			
Dec. 31.	To ck. No. 4738 for.....	333.33	
" "	" " No. 4739 ".....	150.00	
			483.33
" 19.	Cash—personal ac.....		516.67

1893.			
Feb. 8.	To cash salary Dec.....	333.33	
" 8.	" " " January.....	333.34	
" 8.	" " office expenses, Dec.....	666.66	
" 8.	" " " January.....	666.67	
M'ch 27.	" " salary February.....	333.33	
" 27.	" " office expense Feb'y.....	666.64	
Ap'l 4.	" " salary March.....	333.33	
" 4.	" " office expense March.....	666.70	
May 15.	" " salary April.....	333.33	
" 15.	" " office expense April.....	666.67	
June 2.	" " salary May.....	333.33	
" 2.	" " office expense May.....	666.67	
" 30.	" " salary June.....	333.33	
" 30.	" " office expense June.....	666.67	
			8,000.00

1893.	CREDIT.		
Aug. 25.	By cash—check for June salary and office expenses..	1,000.00	
	To balance.....		7,000.00

NEW YORK EXHIBIT No. 30. November 12, 1896. Alex. Cameron, Jr., N. P.

NEW YORK, March 11th, 1891.

Mr. R. E. Jenkins, assignee, Chicago, Ill.

DEAR SIR: In reply to your esteemed favor of the 9th inst. which came to hand this afternoon about three o'clock, I write to express my regret at the unfavorable turn in the conditions of your health,

which required you to return home. Inasmuch as you may wish to communicate with (my) by wire before I leave for home, I desire now to inform you of the condition of affairs here as far as
350 same has come to my knowledge. On Sunday I saw the plant of Mess. Lambeck & Betz and found it in the following condition: Machine erected but not connected with the rest of the plant; brine tank and coils in shape but tank not insulated or covered; condenser tank erected, but with only one coil; storage-rooms as per information given me, piped, excepting one story; ammonia and brine pipes connecting engine-room with storage-rooms, and with Baudelot cooler in storage-room not yet put up. Upon seeing Mr. Lambeck at his home, I was told by him that the work did not progress satisfactorily. That in his judgment, the work should be completed and there was no occasion for the present state of delay. He made no particular complaint against the engineer in charge of the erection of the machine, nor against the foreman in charge of the pipe-work, excepting that the latter did not begin soon enough with his work. Upon my stating the foregoing communications to Mess. Koenigsberg, Hughes and Jenks, I was told that the floor on which the tanks are now placed above the room containing the machine was not completed until five weeks ago. That the storage-house was not turned over to us in proper condition to receive the pipes until about five weeks ago, and that since then, all efforts have been made to push the work constantly with consistent performing of substantial and satisfactory work, and that Mr. Lembeck has no ground for complaint. Assuming that the facts as stated by our employees are true, there certainly can be no ground for complaint on the part of Mr. Lembeck. Doubtless, when he talks about holding us responsible for any damage or harm that may be done him, he imagines that under our contract, he can delay us for three or four months, with impunity, and then insist upon our standing ready every moment to begin to push his work the moment possession of the place is given to us. In this, I think you will agree with me, he is certainly mistaken.

The work at the Consumers' factory is constantly going on, although the second break of a tee has made it impossible to make use of the purifier. The 2nd break occurred yesterday and has again been repaired. The ice is being produced in the required quantity and the coal consumption not exceeding the amount stipulated by the contract. The ice is not quite as nice as that produced by the Consumers' Company of Philadelphia, but it is unquestionably a sort of ice as we need not be ashamed of. The expert employed by the Consumers' Company to represent it in the 30 days' trial run and for the purpose of making his observations of same, began on Monday a week ago, March 2nd. Mr. T. E. Hughes assures me that if
351 such be the proper view, viz., that the trial run began on the 2nd of March, the production of ice and coal consumption, during the period of time since March the 2nd, has been in accordance with our contract, providing, a credit be allowed for the machine not in operation during the time of its inaction in determining the acceptability of the results achieved since March

the 2nd. I have directed Mr. Koenigsberg to write the Consumers a letter, of which a copy is herewith enclosed. If the answer to this letter indicates that the results of the run from March the 2nd to the 9th, inclusive, are deemed unsatisfactory, and not in accordance with contract, then it is my wish, and I have so directed Mr. Koenigsberg, that the trial run should be continued for a full period of 30 days from today, to which action I hope you will give your approval. Both Mess. Koenigsberg and Jenks are agreed that the expert representing the Consumers in observing the trial run, is a fair-minded and just man, which leads me to think that we shall have no trouble in satisfying the Consumers that their machine is able to fully comply with their contract. Mr. Hughes is carefully watching the Consumers' trial run and rendering satisfactory services in connection therewith.

Today I visited the office of Mr. Kitchen, in order to learn whether or not he deemed it desirable that I should see the New York Steam Company. I did not find him in his office, and hence, left a communication in writing, requesting him to notify me of his views in the premises. My own opinion is that it is perfectly useless for me to spend any time upon those who run the affairs of that company. I saw the plant of the steam company, and found it in a very acceptable condition. The two new filters have not yet been connected with the machine but will be in operation day after tomorrow. The ice produced by the machine is only a grade worse than that of the New York Consumers in appearance and as far as I was able to observe, without (order) or taste. I cut out a portion of the core which had small black particles of some substance in it and I found the ice without smell, and the water which was produced by the melting of the ice in my mouth was without taste. I therefore assumed that the particles in the ice were probably charcoal. The machine runs very smoothly. I will ask Mr. Koenigsberg to write the steam company a letter, which I will draft this evening and of which I will also send you a copy enclosed, provided Mr. Kitchen, to whom the same will be first submitted, approves of the (sounding) of the same. I met Mr. Thomas Hughes at the steam company's plant by appointment and requested him to go to Boston tonight, for the purpose of directing Mr. Mitchell, in the matter of the erection of the machine for the Quincy Market Cold Storage Co., at that place. He said it would be necessary to do so in view of your determination which I communicated to him, to leave that

352 plant in the hands of Mr. Mitchell to be completed. Mr. Hughes urged upon me the necessity of sending a competent pipe-fitter to superintend the erection of the atmospheric condenser at that place and to make the ammonia connections, as Mr. Mitchell has no experience in the doing of the work required by the erection of an atmospheric condenser. I thereupon directed him to pick out his best foreman and send him to Boston which he will do. If you desire it, Mr. Mitchell can report expenses and pay-rolls directly to you. If such should be your desire, Mr. Mitchell could be directed to prepare and forward the pay-roll as approximated, on Monday

and the money could be forwarded to him in time for him to make prompt payment on Saturday as has been done heretofore.

Upon receipt of your telegram yesterday, expressing your inability to be here, I sent to the office of Mess. Abbett & Fuller, to make an appointment with them for today. I then learned that Gov. Abbett is in Trenton, and will not be here until Friday. In order to keep my appointment at Washington, I telegraphed to Gov. Abbett today asking him to make an appointment for tomorrow afternoon at Trenton, when I will see him and report the results of our conference. After conferring with Mr. Koenigsberg today I came to the conclusion that it was useless to visit Fresenius Sons for the purpose of making settlement with them. Mr. Koenigsberg believes that they will not entertain any proposition that I might make to them, and after reading their correspondence, their contract and their claim against us, I fully concurred with him. Mr. Koenigsberg also thinks that he is in a better position to talk settlement with Wintter & Company, because he has a long acquaintance with them, and hence, I concluded to leave that matter in his hands for settlement, it being understood that whatever settlement he may make shall be subject to your approval. He thinks that he will be able to get from \$200.00 to \$2,500.00, either of which sums if collected will be satisfactory to me.

Mr. Elkins was here today, pursuant to appointment, and after an hour's conference with him it was clear to all of us that it would be useless to further discuss matters, inasmuch as his mind is made up, irrevocably, not to assume the liabilities of our company. On Thursday we expect to meet Mr. De La Vergne, and if an agreement be arrived at, I will telegraph you the result.

Yours respectfully,

LEO RASSIEUR.

P. S.—Will see Geo. Eblen, Wednesday at 4.30 p. m. at Trenton.

353 NEW YORK EXHIBIT 31. November 12th, 1896. Alex. Cameron, Jr., N. P.

MARCH 12TH, 1891.

Jno. C. De La Vergne, Esq., president De La Vergne Refrigerating Company.

DEAR SIR: In pursuance of telegraphic directions from Mr. Fred Widmann of St. Louis, I was to meet you in New York today. May I trouble you to let me know by bearer at what hour and place you desire to meet Mr. Koenigsberg and myself?

Yours very truly,

L. RASSIEUR.

N. Y. Ex. No. 32. November 12th, 1896. Alex. Cameron, Jr., N. P.

This agreement made and entered into this — day of March, 1891, by and between the Consolidated Ice Machine Company, a corporation of the city of Chicago and State of Illinois party of the first part, Jac. W. Skinkle and Fred. Widmann in their own right, P. J. Lingensfelder and Leo Rassieur as executors of the estate of Edmund

Jungenfeld, deceased, and as trustees of Carl Jungenfeld a minor, and Annie Jungenfeld, Ed. Malinckrodt, the German Savings Institution, a banking corporation of the State of Missouri and Leo Rassieur, who are the owners of all the issued stock of said Consolidated Ice Machine Company, and control the unissued part thereof by virtue of such ownership, parties of the second part, the De La Vergne Refrigerating Machine Company, a corporation of the city of New York, in the State of New York, party of the third part and J. C. De La Vergne, party of the fourth part, witnesseth :

Whereas the said party of the first part on the 14th day of October, 1890, made an assignment for the benefit of its creditors, to Robert E. Jenkins, assignee, who is now engaged in winding up its affairs, and whereas further, the assets of the said party of the first part exceed in value the liabilities thereof, and consist in part of the good will of said party of the first part (which good will has been established by six years of successful manufacture of refrigerating and ice machines together with an expenditure of its earnings to make known its successes in those lines, and whereas said party of the third part is willing to acquire said assets, and discharge all of the said obligations of the said party of the first part, and whereas further, under the laws of the State of Illinois, under which the aforesaid assignment has been made the said party of the first part is not entitled to the possession of the assets in the hands of the

354 assignee until the obligations of the party of the first part have been complied with and discharged or the majority in number and amount of the creditors have signified their willingness to the court having jurisdiction of said assignment and an order has been obtained therefrom, to have the said assets transferred and delivered by said Jenkins to the party of the first part or its assigns, and whereas further, the incompleated contracts of said party of the first part, may require 30 to 60 days to complete the same :

Now, therefore, the said party of the first part and the said parties of the second part agree and covenant to and with the said parties of the third and fourth parts to bargain, sell and convey unto the said parties of the third part, all their rights, title and interest in and to the assets of the said party of the first part, subject to the payment of its obligations and subject to the custody thereof in the legal custodian, the said assignee, and in consideration of which sale and transfer, the said parties of the third and fourth parts, agree and covenant to and with the parties of the first and second parts to issue unto the parties of the second part full-paid stock in said party of the third part to the amount of one hundred thousand dollars and which stock so to be transferred unto the said parties of the second part is to be issued to the said parties of the second part respectively in the following proportions, to wit : To J. W. Skinkle $\frac{50}{200}$, to Fred Widmann $\frac{14}{200}$ to P. J. Lingenfelder and Leo Rassieur as executors aforesaid $\frac{18}{200}$, to P. J. Lingenfelder and Leo Rassieur as trustees as aforesaid $\frac{14}{200}$, to Annie Jungenfeld $\frac{14}{200}$, to Ed. Malinckrodt $\frac{45}{200}$, to the German Savings Institution $\frac{5}{200}$, and to Leo Rassieur $\frac{40}{200}$ thereof.

Second. For the purpose of placing the said party of the third part in complete control of the said assets of the party of first part, subject to the legal rights of said assignee, the said parties of the second part agree within — days from the date hereof to assign to said party of the fourth part, for the benefit of said party of the third part, all the stock of said party of the first part which has been issued, and the said party of the third part within the same period of time, agrees to issue and deliver to said parties of the second part in the proportions aforesaid its said stock to the amount of one hundred thousand dollars, and said parties of the third and fourth parts covenant and agree that the said stock so issued to the said parties of the second part shall annually earn and pay for a period of not less than ten consecutive years from the date hereof an average dividend of — per cent. per annum.

355 Third. The said parties of the second part in consideration of the other provisions of this agreement, covenant and agree to and with the said parties of the third and fourth parts for a period of ten years from the date hereof not to enter into or become connected with any business of making or selling refrigerating or ice-making machinery, directly or indirectly, within the United States of America, except the business of the said party of the third part.

In witness whereof said parties hereto have set their hands and seals to — copies hereof on the date first hereinbefore written.

N. Y. EXHIBIT 33. November 12th, 1896. Alex. Cameron, Jr., N. P.

St. Louis, *March 16th*, 1891.

Mr. Joseph Koenigsberg, No. 213 East 54th St., New York, N. Y.

DEAR SIR: Have telegraphed you that Mr. Buder will leave for Chicago tomorrow and there load material and then come to New York just as we had discussed the matter before I left.

I do not understand why you should telegraph for information which you had as fully when I left New York as when you have my letter. Mr. Buder is willing to enter into the contract with Messrs. Schmitt & Schwanenflugel. Tomorrow I will have papers signed and forward them to you to be delivered to S. & S.

What did you accomplish at Baltimore? Write me fully or if you have written to Chicago, send me a copy of letter. What did you accomplish at Trenton, N. J.? If you have written to Chicago, please send me copy of letter. Mr. Jenkins desires me to continue in charge of directing Eastern work until he recovers from his state of ill health. I wrote in full to Mr. Jenkins.

Yours very truly,

LEO NASSIEURS.

P. S.—I saw Mr. D. L. V. at Cincinnati on Saturday evening and found that he had been detained there by some litigation of his company. He expects to finish same on Monday and go to New York and there get Mr. Fitch, your friend, to look at the contract which I drew and then go to Chicago to meet us there. He declined to close the matter with me at Cincinnati, and suggested the con-

tract would have to contain a clause, binding you not to connect yourself with any other refrigerating business than his own, he deeming your services very valuable. It might be well for you to see Mr. Fitch before Mr. D. L. V. sees him, if possible so that he may lay nothing in the way of the accomplishment of our purpose.
L. A.

356 Don't fail to go to Neidmann's on Wednesday morning to settle. The only deductions to be made are for covers \$90 and for painting \$85.

NEW YORK EXHIBIT No. 34. November 12th, 1896. Alex. Cameron, Jr., N. P.

Leo Rassieur.

B. Schnurmacher.

Rassieur & Schnurmacher, attorneys-at-law, rooms 203, 204, & 205, Granite building, S. W. cor. 4th and Market streets.

St. Louis, *March 18th*, 1891.

Mr. Jos. Koenigsberg, 213 E. 54th street, New York, N. Y.

DEAR SIR: Yours of the 16th inst. is at hand with enclosure. I have written you Monday in full concerning Mr. De La Vergne. Push him to action when he returns from Cincinnati.

I remain, yours very truly,

LEO RASSIEUR.

P. S.—Theo. leaves for Chicago tonight.

NEW YORK EXHIBIT No. 35. November 12th, 1896. Alex. Cameron, Jr., N. P.

This agreement, made this 16th day of August, A. D. 1892, by and between John Featherstone's Sons, of Chicago, Illinois, party of the first part, and Joseph Koenigsberg, of the city of New York, New York, party of the second part, witnesseth as follows:

Whereas, the said John Featherstone's Sons have become the successors in the manufacture of ice and refrigerating machines of the Consolidated Ice Machine Company, and are now and have been engaged in the manufacture and sale of ice and refrigerating machines, known in the market as the Consolidated ice and refrigerating machines, and

Whereas, the said Joseph Koenigsberg, party of the second part, formerly representing the Consolidated Ice Machine Company in the sale of goods of its manufacture, and it being for the mutual interest of both parties to this agreement that the said party of the second part should continue in the market -solidated ice and refrigerating machines, and

Now therefore, the said party of the second part does hereby agree to (*but*) of the said party of the first part, and the said party of the first part does hereby agree to sell to said party of the

357 second part all of the latest improved Consolidated ice and refrigerating machines that he can find sale for on the following terms and conditions, viz:

6-ton machines	\$1,725.00	each f. o. b. Chicago.
10-ton machines	2,500.00	" " "
25-ton machines	4,600.00	" erected.
35-ton machines	5,150.00	" "
50-ton machines	7,300.00	" "
65-ton machines	7,400.00	" "
75-ton machines	8,150.00	" "
100-ton machines	9,600.00	" "
120-ton machines	10,400.00	" "
150-ton machines	14,000.00	" "
150-ton tandem	15,500.00	" "

Any other merchandise ordered by said second party shall be paid for in the same manner as that provided for the payment of machines. Said machines to be delivered f. o. b. Chicago. Said party of the second part to notify said party of the first part of the date when the various machines are desired for delivery, and in no case shall the time be less than agreed upon and fixed for the delivery of said machines as aforesaid. Said notification to be given from time to time to said party of the first part shall have sufficient time to make and complete and deliver said machines.

The payments for said machines are to be made as follows: One-third ($\frac{1}{3}$) cash on delivery as aforesaid, of each machine, and the balance, one-half in sixty (60) days and one-half in ninety (90) days after a satisfactory trial run of the machine, to be evidenced by notes satisfactory to said party of the first part, and payable in sixty and ninety days. Said notes to be secured by an assignment by the said Joseph Koenigsberg, of a sufficient amount of the first payments due him, from any person or contract made by him for Consolidated ice machines, or plants, of which one or more of said Consolidated ice machines, built by the party of the first part, becomes a part or portion of in any manner.

It is further mutually understood and agreed between the parties hereto that the said party of the second part shall not directly or indirectly sell or buy, or in any manner deal in any other ice or refrigerating machines or appurtenances connected therewith, than those manufactured and sold by the party of the first part as aforesaid, except absorption machines of one ton or less. It being understood that the said John Featherstone's Sons, party of the first part, agree not to appoint any other agent authorized to sell the Consolidated ice machine manufactured by them, and all such sales as they may see fit to make under this contract shall be made through their company, or their employes.

In consideration of the agreements in this contract to be kept and performed by said party of the second part, the said party of the first part does hereby give to said party of the second part the sale of the said ice and refrigerating machines and the apparatus connected therewith, for the purpose of the manufacture of ice or refrigerating, manufactured and sold by John Featherstone's Sons in the United States. It is understood, however, that this agreement does not debar said party of the first part from making sales of said

machines in the same territory to consumers or users of machines only.

And the said party of the second part, in consideration of the sale as aforesaid, and the price at which said machines and goods are sold to the said party of the second part, is to actively push the sale of the said machines and appurtenances within the territory aforesaid, and to thoroughly advertise the same, and endeavor to sell as many machines and appurtenances as he can do, by devoting his time and energies to such purpose.

It is further agreed that said Koenigsberg shall sell for the said party of the first part, at least twelve (12) of the said machines each and every year during the continuation of this contract, and if he should fail to do so, then said party of the first part shall have the right to rescind and annul this contract, and put other persons into said territory for the purpose of selling the machines and appurtenances herein agreed to be sold to said Koenigsberg.

It is further mutually understood and agreed that in case any party should apply to said John Featherstone's Sons for the purchase of said ice and refrigerating machines or apparatus connected therewith, within the territory aforesaid, then the said John Featherstone's Sons shall have the right to offer the same for sale, the same as if this contract did not exist, and shall have and hold all the profits accruing from said sale, but they shall keep the said Joseph Koenigsberg, party of the second part, well informed of their prices for said contracts before the same are closed.

It is further mutually agreed that in case any party should apply to said Joseph Koenigsberg for the purchase of said ice and refrigerating machines or apparatus connected therewith, within the territory aforesaid, then the said Koenigsberg shall have the right to offer the same for sale, and all the profits accruing therefrom

shall become the sole property of said Koenigsberg after he
359 has made payment to the said party of the first part for all the amounts due them for machines and fittings used in said sale under this contract. It being understood that the said Joseph Koenigsberg shall keep the said John Featherstone's Sons, party of the first part, well and fully informed of his prices for said contracts before the same are closed and signed.

It is further mutually understood and agreed that under and by virtue of this contract said party of the second part shall have no right nor be authorized in any manner to incur any debt or liability of any kind, against said John Featherstone's Sons for or by reason of any matter arising under this contract, or made by virtue thereof.

It is further mutually understood and agreed that said Koenigsberg shall advertise the machines as aforesaid, as the Consolidated ice and refrigerating machines, manufactured by John Featherstone's Sons, of Chicago, Illinois, and that each of said machines as put out shall have an inscription thereon as near as may be, as follows: "Consolidated ice machine, manufactured by John Featherstone's Sons, Chicago, Illinois," or "Consolidated refrigerating machine, manufactured by John Featherstone's Sons, Chicago, Illi-

nois," or such other inscription thereon as said John Featherstone's Sons may select, for the purpose of thoroughly identifying in the market such machines as the machines manufactured by John Featherstone's Sons, Chicago, Illinois.

All contracts made by said Koenigsberg shall be taken by him for the sale by him of the latest improved Consolidated ice or refrigerating machine, manufactured by John Featherstone's Sons, Chicago, Illinois.

Said party of the second part in all contracts made for the sale of these machines by him or other parties, shall provide that the property shall remain as his property until fully paid for, or security therefor taken satisfactory to said party of the first part.

Said party of the second part shall give no guarantee on any contract for the sale of these machines unless such guaranty is approved by said John Featherstone's Sons.

It is further mutually understood and agreed that neither party to this contract shall make figures or estimates on any work for refrigerating or ice-making machines, without fully informing the other party to this contract of the amount of money for which they propose to do the work, and what they propose to furnish under said contract before the same is entered into, and that the price on the same contract shall be made the same in all cases, by both parties.

360 It is further understood and agreed that when a contract has been offered to both parties to this agreement, it shall be taken by the one to whom application has been first made, and the other shall aid and assist him or them to secure the same in every reasonable manner.

It is further agreed and understood that, if application is made to both parties to this contract for prices on machinery by the same person or persons, on the same date, then the first of said contracts shall be awarded to Joseph Koenigsberg, party of the second part, and the second to John Featherstone's Sons, party of the first part, and so alternating from one to the other, so that each party shall have an equal number of said contracts.

It is further agreed that when the party of the first part shall sell an engine or refrigerating machine to the said party of the second part, that the said John Featherstone's Sons shall erect the same on its foundations in good running order, except the six and ten ton machines, which the said Koenigsberg shall erect at its own expense.

It is further agreed that if the said Joseph Koenigsberg, party of the second part, should at any time take contracts to put in machines manufactured by the party of the first part, and the said party of the first part have approved of the same, then it is understood if the said Joseph Koenigsberg should be unable to carry out the same, that John Featherstone's Sons will furnish the necessary labor and material to complete the contract on the condition that they, the said John Featherstone's Sons, shall receive out of said contract for said labor and material the cost of same, and a *pro rata* of the profits based on the estimated cost of carrying out said con-

tract to completion. Said estimate to have been made and approved by said party of the first part, before the said party of the second part entered into the said contract.

The party of the first part guarantees that all machines sold the party of the second part, shall be as represented in the special contract made for such machine, and that they will give bond, when called upon to do so, to protect any party using said machines against all claims for patents.

Any modification or change in this contract in any manner, shall not be binding upon the parties hereto unless such modification or change shall be in writing and signed by the parties hereto or their duly authorized agents.

This contract shall take effect and be in force on and after the 1st day of October, 1892, but shall not be binding on either party hereto until said date.

361 This contract to be binding upon, and run to the benefit of the said party of the first part, its successors and assigns, and to be binding upon the said party of the second part, his heirs, executors, administrators and assigns.

In witness whereof the parties hereto have caused this agreement to be executed, the day and year first above written

JNO. FEATHERSTONE'S SONS,
Per E. THOMAS, *Gen'l Mgr.*
JOSEPH KOENIGSBERG.

Witness :
WM. ANDERSON.

NEW YORK EXHIBIT No. 36. November 12th, 1896. Alex. Cameron, Jr., N. P.

NEW YORK, *September 14th*, 1891.

I take pleasure in announcing to the public, and particularly to my patrons who were customers of the Consolidated Ice Machine Company during the long period of my connection with that company, that I have recently made arrangements so as to be able to serve them in future. The De La Vergne Refrigerating Machine Company has for some time past been the owners of letters patent No. 175,020, which *was* granted to James Boyle, March 21, 1876, for gas compressors. This patent covers the style of compressor used on the machine which I have heretofore been engaged in selling. Having severed my connection with the Consolidated Ice Machine Company, which made an assignment October 14, 1890, I have now arranged with the De La Vergne Refrigerating Machine Company to build refrigerating and ice-making machines under the letters patent above referred to, and to furnish the same to such of my old patrons and to new customers as may desire to purchase them.

Trusting that you may favor me in the future with your orders, I am,

Your obedient servant,

J. KOENIGSBERG.

N. Y. EXHIBIT 37. New York, November 12th, 1896. Alex. Cameron, Jr., N. P.

J. Koenigsberg gives the following communication which he received from Mr. H. G. Thomas, representing legally J. Featherstone's Sons, Chicago, Ills.:

If the De La Vergne Refrigerating Machine Company withdraws the notices which it has sent to the customers of the Consolidated Ice Machine Co. and proprietors of Consolidated ice machines, and will grant a license to J. Featherstone's Sons to build Consolidated machines under the Boyle patent owned by the De La Vergne Refrigerating Machine Co. during the life of this patent, J.

Featherstone's Sons will enter into an agreement with the De La Vergne Ref. Mach. Co. and give them the "sole right" to sell Consolidated plants in the following territories: Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Delaware and Pennsylvania, and agree not to solicit any orders in these States, and if any inquiries should come to them from these States for Consolidated ice machines or plants they will hand such inquiries over to the De La Vergne Refrigerating Machine Co., represented by J. Koenigsberg and that the De La Vergne R. M. Co. or its representative J. Koenigsberg, are to and can use their own judgment as to prices, etc. in the within-named States.

J. Featherstone's Sons further agree to publish in all the papers that they have given the sole right of selling Consolidated machines in the within-named States to J. Koenigsberg, as representing the De La Vergne Refrigerating Machine Co.

Further, they will agree to give the De La Vergne R. M. Co. the right to sell Consolidated machines in the whole of the United States, but in such cases the De La Vergne Co. must agree not to quote lower prices for such machines to intending purchasers (then) J. Featherstone's Sons would ask, and in all such cases where machines or plants are to be placed anywhere in the United States outside of the States mentioned, J. Koenigsberg, as representative of the De La Vergne R. M. Co. shall confer with J. Featherstone's Sons and the price to be quoted to purchaser shall be agreed upon between the two.

In all cases where Consolidated machines or plants are to be sold, J. Featherstone's Sons shall furnish the Consolidated machine to the De La Vergne R. M. Co. This agreement to be made for two years (and) an understanding (or) agreement to be had or made at the same time (—) which the following scheme is to be expressed or embodied:

"An arrangement for uniformity of prices for the future, in order to obviate cutting of prices, so as to enable all concerned to get as much for their machines and plants as possible.

"To take into this combination one or two of the most responsible and strong companies."

Further, J. Featherstone's Sons agree to hold up the patent and

assist the De La Vergne R. M. Co. in collecting fees from parties infringing on this patent, outside of customers of the Consolidated Ice Machine Co., and that these fees shall be the sole property of the De La Vergne R. M. Co. and no part of them are to be turned over to J. Featherstone's Sons.

N. Y. EXHIBIT 38. November 12th, 1896. Alex. Cameron, Jr., N. P.
(October 15.) The Western Brewer; and Journal of the Barley,
Malt and Hop Trades. 2455.

Joseph Koenigsberg, late secretary of the Consolidated Ice Machine Co.

Ice-making and refrigerating machinery built under Boyle patent, formerly used by the Consolidated Ice Machine Co.

Office: 213 East Fifty-fourth street, New York city.

x x
.
Cut of
ice machine
will appear in
next issue.
.
x x

Over 250 machines in actual operation in breweries, packing-houses, cold-storage houses.

Ice-making plants, etc., from 1 ton to 150 tons capacity.

We do not build the "Cheap John" machinery that is now glutting the market, as it does not pay in the long run. We believe the cheapest plants are the finest that can be built. Experience of many has proved this. If you want the best—that is, the most durable, economical and efficient machine—at a reasonable price, send here for catalogue and estimates.

We guarantee all we sell and give bond to back up all we say.

N. Y. EXHIBIT 39. November 12th, 1896. Alex. Cameron, Jr., N. P.

NEW YORK, *December 30th*, 1890.

Pennsylvania Iron Works Co., 80th St. and Merriam Ave., Philadelphia, Pa.

GENTLEMEN: In compliance with your request, I hereby give you my ideas in regard to the association of our interest in reference to taking contracts this coming year, for Consolidated machines.

The assignee, who has at his disposal, about twelve Consoli-

364 dated machines, of different sizes, partly finished and partly unfinished, and for which he is responsible, has conveyed to me the authority and granted me the privilege to sell those machines, or take contracts to erect them on my own account, but without making him or the insolvent company liable for anything.

I wish to enter into an agreement with you, for one year, from the first of January, 1891, by which we take any contracts we can get for Consolidated machines, I to receive a weekly salary of one hundred and twenty-five dollars (\$125.00), and one-third of the net profits. A large part of my profits, I have to pay to the assignee, and out of my salary, I will pay the office rent in New York, as I intend to keep the present office occupied by the Consolidated Ice Machine Company. You to furnish the necessary capital and give the required security and bonds for the execution of those contracts. You to take two-thirds of the net profits and furnish such material and labor, at lowest price, you manufacture at your works.

I agree to use my best efforts to have the stockholders of the Consolidated Ice Machine Company, after the same has been discharged out of the hands of the assignee to sell to you the drawings, patterns, tools, machinery, good will, patents, etc., etc., for a reasonable amount. Appraisement to be made by a committee of three, you to select one, the Consolidated the second, and those two to select the third, who shall appraise the above-named property, and their appraisement to be accepted as binding, and you to pay this amount in capital stock of your company, at par, this stock to be issued for that purpose.

I can transfer to you, at present, contracts for three 50-ton machines, amounting to sixty-nine thousand dollars (\$69,000.00), in which there is an evident profit of \$23 to \$24,000.00 dollars. This is the tenor of what I talked yesterday, with your Mr. Elkins, and I hope you will inform me of your intentions in the matter at an early date.

Yours truly,

J. KOENIGSBERG.

N. Y. EXHIBIT 40. November 12th, 1896. Alex. Cameron, Jr., N. P.

(Copy.)

JANUARY 2ND, 1891.

Mr. J. Koenigsberg, New York.

DEAR SIR: Your favor of December 30th received. In reply would say, I have the following suggestions to make:

365 That the Pennsylvania Iron Works Company have authority from the assignee of the Consolidated Ice Machine Co. of Chicago, Ills., to sell ice and refrigerating machines, or parts thereof, as built and constructed by the Consolidated Co. now in the hands of the assignee, at prices to be agreed upon f. o. b. cars, Chicago, Ills. Assignee to also agree to give iron works Co. proper authority to use the patterns and drawings of the Consolidated Co. for the purpose of building any parts of the machines, and machines and engines built which they may sell. Said arrangement to continue only during the time necessary for assignee to wind up the

affairs of the Co., which shall be within one year. The iron works Co. to agree to continue the business, which the Consolidated Co. was incorporated for, during above referred to period of liquidation, in manner as above, making all sales and doing all business for their own account, but paying the assignee of the Consolidated Co. in addition the prices for machines purchased as agreed upon, the sum of one-eighth of one cent per pound of clean castings made from patterns furnished, for use of all the patterns and drawings necessary for carrying on the business, as contemplated by the agreement to be made covering the above conditions; all payments to be made by the iron works Co. in manner as their contract for sale of the machines provides.

The iron works Co. to agree to employ and to pay Mr. J. Koenigsberg for such employment at the rate of 15 % on the net profits of all the ice-making and refrigerating machines of the above character sold when same have been erected and all expense charged thereto, and the machines collected for in full; advancements to be made at the rate of \$250.00 per week, which shall be charged to his account of commissions provided the same will permit of it, and by the iron works Co. charged to the cost of erection of machines.

The whole management and expense of operating the iron works Co. for a year, to be charged to the several department- of the said company, in proportion to their respective total sales for the year commencing January 1st, 1891.

The employment of the said J. Koenigsberg to continue as above until the liquidation of the Consolidated Company, provided all of his time is devoted to the iron works Co., except such as may be required by the assignee in liquidation of the Consolidated business, he then to be employed by the iron works Co. at a salary of \$5,000.00 per annum and expenses, and devote his entire time to the sale of machines. All of the above-proposed arrangement to be entered into by the said iron works company provided the stockholders of record of the Consolidated Co. will deposit with a trustee to be chosen, each and every share of stock of the Consolidated Co. issue for the specific purpose of making an agreement with the iron works Co., agreeing to sell all of the issued shares of stock of said company (the entire capitalization of same being \$200,000.00) to the iron works Co., and receiving in payment therefor stock of

366 the iron works Co., at par for the value of the Consolidated Company's stock, to be determined by an appraisement of its assets, which shall not include any patents and only such patterns which can be used in the construction of marketable machines, after all moneys have been collected and creditors of said Consolidated Co. paid, such appraisement to be made by three appraisers, one to be selected by the Consolidated Co., one by the iron works Co., and these two to select a third.

All money in the treasury of the Consolidated Co., and all that which is to be collected after the liquidation by the assignee, to be declared in dividends to the iron works Co., who will become the owners of the Consolidated Co.'s stock. No money, after liquidation, to be paid for any purpose except for expenses in liquidating, in

payment of accrued obligations, and such others incident to settling the company's affairs. The trustee of the Consolidated Co.'s stockholders to give satisfactory negotiable bonds in the sum of \$10,000.00 for fulfillment of contract to be entered into, same to be forfeited upon failure to complete the agreement as called for, within two weeks after the statement of the affairs by the assignee. If the above arrangement can be entered into I am satisfied that our people will have no hesitancy in going on with the business as proposed.

Very truly yours,
(Signed)

WM. L. ELKINS, JR.

N. Y. EXHIBIT 41. November 12th, 1896. Alex. Cameron, Jr., N. P.

NEW YORK, *January 3rd*, 1890.

William L. Elkins, Jr., Esq., Philadelphia, Pa.

DEAR SIR: Your favor of yesterday received. In reply, I wish to state that I think that I could induce the stockholders of the Consolidated Ice Machine Company to enter into an agreement with you as expressed in your favor, but you must be more liberal during the time before the assignee has liquidated and paid the debts of the company, i. e., actually the time before the stockholders of the Consolidated Company exchange their assets for stock in your company. I would be willing to accept the fifteen per cent. of the net profits, but the weekly salary of one hundred and twenty-five dollars (\$125.00) must be allowed to me without being charged to this commission. This salary should be charged to the erection (amount) or the cost of the machine and not to be considered as an advancement to me. If you will grant me this change, notify me at once and I think we can make the deal.

Certainly the form of contract would have to be agreed to afterwards, but the essence of same will be as expressed in your
367 favor of yesterday. Hoping to receive your decision, I remain,

Yours truly,

J. KOENIGSBERG.

N. Y. EXHIBIT 42. November 12th, 1896. Alex. Cameron, Jr., N. P.

NEW YORK, *January 6th*, 1894.

William L. Elkins, Esq., Philadelphia, Pa.

DEAR SIR: Your favor of January 5th received and contents noted. I shall try my best to go to Chicago the latter part of this week and close matters up to mutual satisfaction. At the same time I would ask you to call on Mr. Vanderslice, the lawyer of Mr. Roshin, whose office is 608 Chestnut street, and see if he has finished the contract. I have sent the blue prints of the machine and tanks to Mr. De Kinder so that there will be no delay on our part and Mr. Roshin can go on with his building.

I have outside of the two contracts, a few more in sight which I will be able to report to you as soon as I return from Chicago. As

soon as your presence is required, I will telegraph you from Chicago, where to meet me in that place.

Yours truly,

J. KOENIGSBERG.

NEW YORK EXHIBIT No. 43. November 12th, 1896. Alex. Cameron, Jr., N. P.

Covenant and agreement made this — day of January eighteen hundred and ninety-one, between J. W. Shinkle, of Chicago, Illinois, Joseph Koenigsberg and — — —, of St. Louis, Missouri; the Consolidated Ice Machine Company, a corporation duly chartered under the laws of the State of Illinois; R. E. Jenkins, Esq., assignee for the benefit of the creditors of the said Consolidated Ice Machine Company, hereinafter called the party of the first part, and the Pennsylvania Iron Works Company, of Philadelphia, a corporation duly chartered under the laws of the State of Pennsylvania, hereinafter called the party of the second part:

Whereas the said Consolidated Ice Machine Company lately, to wit: on the — — — made an assignment for the benefit of its creditors to R. E. Jenkins, Esq., under the laws of the State of Illinois, and the said assignee is now in possession of all of the property and assets of the said Consolidated Ice Machine Company which assets are alleged by the party of the first part to be in excess of the liabilities of said company, and whereas, the stockholders

of said company desire to wind up and dissolve the said company and dispose of the assets and property which shall belong to said stockholders after the said winding up and dissolution to the party of the second part,

Now this agreement witnesseth: That in consideration of the mutual covenants herein contained the parties hereto do agree as follows:

I. The party of the first part covenants and agrees:

1. That the said J. W. Shinkle is the owner of — shares of the capital stock of the Consolidated Ice Machine Company, full paid and unassessable, and that the said J. W. Shinkle holds the certificate therefor, and that the said Jos. Koenigsberg is the owner — and that blank shares of said stock are in the treasury of said company unissued, and that the said J. W. Shinkle, Jos. Koenigsberg, — — —, are all of the owners of the capital stock issued of the said corporation.

2. That the Consolidated Ice Machine Company is the owner and was the owner of all the machinery patterns, patents, drawings and property a list of which is contained in Schedule "A" (which schedule is annexed hereto and is hereby made a part of this covenant and agreement as fully and completely as if said schedule were written herein) at the date of the assignment for the benefit of the creditors. That all of said machinery patterns, patents, drawings and property *was* at the date of said assignment and *is* now free from all incumbrances lien charge debt set-off or claim whatsoever. (And that said patents are good valid and subsisting patents.)

Out. }

3. That the said R. E. Jenkins, Esq., assignee, etc., has at the date hereof full and complete title as assignee for the benefit of creditors to all of said property as given to him by said assignment.

4. That the said Consolidated Ice Machine Company is the owner and was the owner creditor and payee of all the bills receivable and book accounts contained in Schedule "B" (which schedule is annexed hereto and is hereby made a part of this agreement as fully and completely as if said schedule were written herein) and the said bills receivable and book accounts are good valid and subsistent debts due to said Consolidated Ice Machine Company, and are free from counter-claim counter-demand in law or in equity set-off lien charge attachment or incumbrance of any sort (of) kind whatsoever. And that they are worth in value the amounts named respectively in each item contained in said Schedule "B."

Out. 5. That the statement contained in Schedule "C" (which schedule is annexed hereto and is hereby made a part of this covenant and agreement as fully and completely as if said schedule were written here) is a full and complete statement of the book account bills payable and receivable debts and credits of the Consolidated Ice Machine Co. on the date of the assignment to R. E. Jenkins, Esq.

369 II. The party of the first part hereby conveys transfers assigns set-over grants bargains and sells to the party of the second part all and every of the machinery patterns patents drawings and property mentioned in said Schedule "A" together with a sum of money equal to the balance which shall belong to and remain due to the said Consolidated Ice Machine Company after the payment of all debts due by the company.

III. The party of the second part agrees to pay to the said Consolidated Ice Machine Company the sum of one dollar. The party of the second part agrees to enter into a certain written contract with the said R. E. Jenkins, Esq., assignee for the benefit of creditors etc., which contract is already prepared and is to be executed as of even date herewith, and to pay to the said assignee etc., the sum of one dollar. The party of the second part agrees to transfer and issue to the said J. W. Shinkle, Jos. Koenigsberg, ——— a certain number of shares of the capital stock of the Pennsylvania Iron Works Company, the amount of which at the par value of said stock shall be equal to the value of the assets of the said Consolidated Ice Machine Company over and above all its liabilities and which shall remain due and belong to the stockholders of the said company after the winding up and dissolution of the said company. Provided that in computing the value and amount of the said assets there shall be included only such (1) money (2) machinery patterns drawings patents and personal property and (3) credits as follows: (1) Such balance of money (if there shall be any such balance) as shall remain in the hands of the stockholders after the settlement of the assignment for the benefit of creditors and after the winding up and dissolution of the company and after the payment of all debts liabilities and expenses whether of winding up said agreement of

corporation or of any kind whatsoever; and which sum of money shall be paid to the party of the second part. (2) Such machinery patterns patents drawings and personal property as is set forth and contained in Schedule "A" aforesaid or so much thereof as shall remain the property of the said Consolidated Ice Machine Company and its stockholders after the settlement of the assignment for the benefit of creditors and the winding up of the said corporation and which shall be delivered by the party of the first part to the party of the second part. Said machinery patterns drawings and personal property shall be received by the party of the second part at the values fixed in the said Schedule "A." (3) If there shall be any accounts receivable which for any reason are not paid or collected at the date of the settlement of the assignment for the benefit of creditors, it is agreed that the said account shall be assigned to — — in trust nevertheless to collect the said accounts and (paid) the money by him collected to the party of the second part and the party of the second part agrees to issue capital stock of the Pennsylvania Iron Works Company in proportion to the amount collected and in the manner and ratio provided in paragraph — hereof. Provided said collections are made within one year from the date hereof.

If the accounts receivable shall not be sufficient to pay the liabilities of the said Consolidated Ice Machine Company and it shall become necessary to dispose of any part of the other assets of the said company it is expressly understood that the amount of the capital stock of the Pennsylvania Iron Works Company to be issued to the said J. W. Shinkle, Jos. Koenigsberg, — — shall be proportionately reduced.

The stock of the Pennsylvania Iron Works Company aforesaid shall be of a new issue and increase of the capital stock of the said company. Said stock shall not be delivered nor issued by the party of the second part until the said assignment for the benefit of creditors is settled and ended and the said Consolidated Ice Machine Company is wound up and dissolved.

It is agreed that the party of the first part will not hinder nor delay the party of the second part in taking speedy possession of said property but will do all in their power to further the delivery of said property to said party.

And it is agreed that the settlement of the assignment for the benefit of creditors now existing shall be pushed and prosecuted as speedily and diligently as possible by the party of the first part and that the said assignment shall be settled and wound up and the report of the said assignee filed and he be discharged with all proper and reasonable speed (within one year from the date hereof). And the party of the first part covenants that it will do all in its power to expedite said settlement and winding up of said assignment. And it is agreed that the said Consolidated Ice Machine Company shall be wound up and dissolved and shall cease to exist immediately after the settlement of the assignment for the benefit of creditors, and that the assets of the said corporation shall be immediately distributed in accordance with this agreement.

And it is agreed that if the said corporation is not wound up within one year of the date hereof the party of the second part shall have the option of annulling avoiding and setting aside this contract and returning whatever property may have been conveyed to it under it, or the actual value of said property.

And it is agreed that the certificates of stock in the Consolidated Ice Machine Company shall be delivered to ——— as trustee for the said J. W. Shinkle, Jos. Koenigsberg, ——— in trust nevertheless to hold the same until the said Consolidated Ice Machine Company is wound up and dissolved and until the number of shares of stock of the Pennsylvania Iron Works Company to which each of said persons is entitled is ascertained and the stock certificates therefor issued, and then to cancel and destroy said certificates in the Consolidated Ice Machine Company.

And it is agreed that the party of the second part shall have full and complete access to all of the books of the said Consolidated Ice Machine Company and the books of the assignee for the benefit of the creditors of the said company and shall receive full and complete information concerning said books at all times from the party of the said part.

And it is agreed that said J. W. Shinkle, Jos. Koenigsburg, ——— nor any of them will not engage directly or indirectly in the business of selling making or erecting ice or refrigerating machines for the space of ten years from the date hereof within the States of Illinois, New York or Pennsylvania.

Signed sealed and delivered this — day of January, 1891.

N. Y. EXHIBIT 44. November 12th, 1896. Alex. Cameron, Jr., N. P.

This agreement made and entered into this — day of March, 1891, by and between the Consolidated Ice Machine Company, a corporation of the city of Chicago, and State of Illinois, party of the first part, Jac. W. Skinkle and Fred. Widmann in their own right, J. P. Kingenfelter and Leo Rassieur as executors of the estate of Edmund Jungenfeld, deceased, and as trustees of Carl Jungenfeld a minor, and Annie Jungenfeld, Ed. Mallinckrodt, the German Savings Institution, a banking corporation of the State of Missouri, and Leo Rassieur, who are the owners of all the issued stock of said Consolidated Ice Machine Company and control the unissued part thereof, by virtue of such ownership, parties of the second part, Robert E. Jenkins, assignee of said Consolidated Ice Machine Company, of said city of Chicago in the State of Illinois, party of the third part, The Pennsylvania Iron Works Company, a corporation, of the city of Philadelphia, in the State of Pennsylvania, party of the fourth part, William L. Elkins, Jr., party of the fifth part.

Witnesseth: Whereas, the said party of the first part, on the 14th day of October, 1890, made an assignment for the benefit of its creditors to the said party of the third part, who is now engaged in winding up its affairs, and whereas further, the assets of the party of the first part exceed in value the liabilities thereof, and consist

in part of the good will of said party of the first part (which good will has been established by six years of successful refrigerating and ice-machine making, together with an expenditure of its earnings, to make known its successes in those lines), and whereas said party of the fourth part is willing to acquire said assets, and discharge all of the obligations of said party of the first part, and whereas, further, under the laws of the State of Illinois, under which the aforesaid assignment has been made, the said party of the first part is not entitled to the possession of the assets, in the hands of the assignee, until the obligations of the party of the first part have been complied with and discharged, or the majority in number and amount of the creditors have signified their willingness to the court having jurisdiction of said assignment, and an order has been obtained therefrom, to have said assets transferred and delivered from the custody of said party of the third part to the party of the first part, and whereas further the incompleated contracts of said party of the first part may require 30 to 60 days to complete the same:

Now, therefore, the said party of the first part and the said parties of the second part agree and covenant to and with the said parties of the fourth and fifth parts to bargain, sell and convey unto the said party of the fourth part, all their rights, title and interest in and to the assets of the said party of the first part, subject to the payment of its obligations and subject to the custody thereof in the legal custodian, the said party of the third part, and in consideration of which sale and transfer the said party of the fourth and fifth parts agree and covenant to and with the parties of the first and second parts, to issue unto the said parties of the second part full paid stock in said party of the fourth part to the amount of one hundred — thousand dollars, which said stock so to be trans-

373 ferred unto the said parties of the second part is to be issued to said parties of the second part respectively, in the following proportions, to wit: to J. W. Skinkle $\frac{5}{200}$, to Fred. Widmann $\frac{14}{200}$, to P. J. Lingenfelder and Leo Rassieur, executors as aforesaid, $\frac{18}{200}$, to P. J. Lingenfelder and Leo Rassieur as trustees as aforesaid $\frac{14}{200}$, to Annie Jungensfeld $\frac{14}{200}$, to Ed. Mallinckrodt $\frac{45}{200}$, to the German Savings Institution $\frac{5}{200}$ and to Leo Rassieur $\frac{40}{200}$ thereof.

Second. For the purpose of placing the said party of the fourth part in complete control of the said assets of the party of the first part, subject to the legal rights of said party of the third part, the said parties of the second part agree within ten days from the date hereof to assign to said party of the fifth part, for the benefit of the said party of the fourth part, all the stock of said party of the first part which has been issued, and the said party of the fourth part, within the same period of time, agrees to issue and deliver to said parties of the second part, in the proportions aforesaid, its said stock to the amount of one hundred — thousand dollars, and parties of the fourth and fifth part covenant and agree that the said stock so issued to the parties of the second part, shall annually earn and pay, for a period of not less than ten consecutive years from the date hereof, an average dividend of six per cent. per annum.

Third. The said party of the second part, in consideration of the

other provisions of this agreement, covenants and agrees to and with the said parties of the fourth and fifth parts, for a period of ten years from the date thereof, not to enter into or become connected with any business of making or selling refrigerating or ice-making machinery, directly or indirectly, within the United States of America, except with the said party of the fourth part.

Fourth. Said party of the third part covenants and agrees to and with said party of the fourth part as owner of the stock of the party of the first part, to turn over and deliver to it, all of the assets of the said party of the first part, which remain in his hands, as soon as the debts and obligations of the said party of the first part have been paid and discharged, and also prior thereto if an order for the turning over of such assets be obtained from the court which has jurisdiction of such assignment, upon the application of creditors.

Fifth. Subject to the approval of the county court of Cook county in the State of Illinois, the said party of the third part herewith
374 covenants and agrees to and with said party of the fourth part to sell, transfer and convey to said party of the fourth part, all right, title and interest of said party of the first part in and to the piece of ground occupied by said party of the first part as its shop in said city of Chicago, subject to all the covenants payments and restrictions set forth in the indenture of lease by which said right and title may be evidenced; also all of its machinery, tools, fixtures, office furniture, patterns, drawings, good will, merchandise, material and stock on hand and not required for the completion by said parties of the first and third parts, regardless of where said property, merchandise and patterns may be situated. In consideration of said transfer so to be made to said party of the fourth part, said party of the fourth part agrees and covenants to issue and deliver to said party of the third part its six promissory notes, each for twenty-five thousand dollars, payable two, three, four, five, six, and seven months after date thereof respectively.

In witness whereof the said parties hereto have set their hands and seals to eight copies hereof the date first hereinbefore written.

It was admitted by the De La Vergne Refrigerating Machine Company that for the purpose of releasing certain attachments in the causes making up this consolidated cause, John C. De La Vergne, deceased, deposited with Adolphus Busch, a resident of the city of St. Louis, in the State of Missouri, certain stocks in the De La Vergne Refrigerating Machine Company, belonging to John C. De La Vergne, deceased, and that the certificates of stock in said De La Vergne Refrigerating Machine Company are still held and retained by said Adolphus Busch in the said city of St. Louis, and, in this connection, the De La Vergne Refrigerating Machine Company offered to show by William C. Richardson, public administrator, that no property of any kind or description belonging to John C. De La Vergne, deceased, has come into his possession or control, and that the only property of John C. De La Vergne, deceased, if any, within the State of Missouri at the time of his death or at the present time was the certificates referred to; which certificates were endorsed by said De La Vergne in blank. To which offer of proof

the plaintiffs objected, which objection was by the court sustained; to which ruling of the court the defendant then and there duly excepted.

The foregoing is all the evidence offered by the defendant.

And thereupon, the defendant, The De La Vergne Refrigerating Machine Company, requested the court to find the following propositions or statements of fact as proven by the evidence in this case, viz :

375 In the Circuit Court of the United States within and for the Eastern Division of the Eastern District of Missouri.

GERMAN SAVINGS INSTITUTION, Plaintiff,

vs.

THE DE LA VERGNE REFRIGERATING MACHINE COMPANY and
W. C. Richardson, Public Administrator, Representing the Estate of John C. De La Vergne, Deceased, Defendants.

LEO RASSIEUR

vs.

SAME DEFENDANTS.

JACOB W. SKINKLE

vs.

SAME DEFENDANTS.

EDWARD MALLINCKRODT

vs.

SAME DEFENDANTS.

ANNIE JUNGENSELD

vs.

SAME DEFENDANTS.

LEO S. RASSIEUR, Ex'rs, &c.,

vs.

SAME DEFENDANTS.

P. J. LINGENFELD and LEO RASSIEUR, Trustees, &c.,

vs.

SAME DEFENDANTS.

Consolidated cases.

The defendant, The De La Vergne Refrigerating Machine Company, requests the court to find the facts, as follows :

I.

The De La Vergne Refrigerating Machine Company is, and was at the time of the commencement of these actions, a corporation organized under the laws of the State of New York governing the organization of manufacturing corporations enacted on the 17th day of February, 1848, entitled "An act to authorize the formation

of corporations for manufacturing, mining, mechanical or chemical purposes," and which laws, in and by the terms thereof, provide that "it shall not be lawful for such company to use any of their funds in the purchase of any stock in any other corporation;" and said corporation, during the years 1890 and prior and subsequent thereto, was engaged in the business of manufacturing and selling refrigerating machinery, having its principal office and place
376 of business at the foot of 138th street in the city and State of New York.

II.

That the president and principal stockholder of said corporation, in the year- 1890 and 1891, was one John C. De La Vergne, who was made originally a defendant in these actions and was served with process and had appeared herein; that said John C. De La Vergne died testate on May 12th, 1896, in the city of New York and State of New York, where the executors appointed under his will are engaged in the administration of his estate; that said executors have never appeared in these actions, or any of them, nor has any *scire facias* or other process been issued in said actions, notifying such executors so to appear.

III.

That the said John C. De La Vergne's estate is represented in these actions by W. C. Richardson, who is the duly qualified and acting public administrator under the laws of the State of Missouri, and appears as such representative in these actions solely in his capacity as such public administrator.

IV.

That the Consolidated Ice Machine Company was a corporation organized under the laws of the State of Illinois, in the year 1885; that the purpose of such organization, and the business in which the corporation was engaged, was the manufacture of refrigerating machinery; that the total capital stock of said company, as organized, was two hundred thousand dollars (\$200,000), of which one W. B. Bushnell subscribed for fifty thousand dollars (\$50,000) as treasury stock and an additional fifty thousand dollars (\$50,000) in his own right; that no part of the fifty thousand dollars (\$50,000) treasury stock was ever paid for, or sold by him, or issued by the company; that of the fifty thousand dollars (\$50,000) subscribed in his own right, the said Bushnell paid twenty per cent. (20 %), or ten thousand dollars (\$10,000), and his shares were afterwards duly forfeited to the company for non-payment of additional installments of stock of eighty per cent. (80 %), and were held and owned by the company on October 14th 1890; that the remaining stock of said Consolidated Ice Machine Company, amounting in all to one hundred thousand dollars (\$100,000), was fully paid, and was held by the persons who are plaintiffs in these several actions, and in the proportions set out in their several declarations filed herein, and in the agreement of April 16th, 1891, hereinafter referred to.

V.

That said Consolidated Ice Machine Company became insolvent, and made a general assignment to one Robert E. Jenkins
 377 under date of October 14th, 1890, which assignment was duly executed and was made pursuant to the laws of the State of Illinois, and said Jenkins entered into possession of all of the assets of said Consolidated Ice Machine Company of every nature and description, including the good will, on said date, and which assignment is yet in full force and effect. That said estate has been economically administered, and will pay (when the assets are fully disposed of and distributed) not to exceed seventy-five per cent. (75%) of the total indebtedness of said company which, at the date of the assignment, exceeded five hundred and fifty thousand dollars (\$550,000).

VI.

That on the 16th day of April, 1891, the defendant corporation, by its president, John C. De La Vergne, and said John C. De La Vergne personally, entered into a contract with the Consolidated Ice Machine Company and the holders of its issued stock, plaintiffs in these actions, a copy of which contract is filed herewith, marked "Exhibit A."

VII.

That said contract was never authorized by either the directors (of) stockholders of the De La Vergne Refrigerating Company, nor was the same discussed at any meeting of either the directors or stockholders of said company prior or subsequent thereto.

VIII.

That in January, 1891, the said John C. De La Vergne had directed one H. W. Guernsey to investigate the value of the assets of the Consolidated Ice Machine Company, which he had done, and submitted to the said John C. De La Vergne a (written) report,—a copy of which report is filed herewith, marked "Exhibit B"; and in the summer of 1891, subsequent to the making of the contract heretofore referred to, the said John C. De La Vergne had directed one John R. Waters to attempt to negotiate with the creditors, or a majority thereof, for a purchase of their claims, which the said Waters did. That both Guernsey and Waters submitted accounts for services in connection with these employments, which accounts were directed to be paid by Mr. John C. De La Vergne, and were paid by the defendant, The De La Vergne Refrigerating Machine Company.

IX.

That prior to the insolvency and assignment of the Consolidated Machine Company, the said company had maintained an office in the city of New York, which was in charge of one Joseph Koenigsberg had made many contracts throughout the Eastern
 378 States for Consolidated ice machines, which were, at the date of the assignment, in an unfinished state; and a consider-

able portion of the assets of said company consisted in the accounts against the purchasers of these machines through Koenigsberg, that prior to April 16th, 1891, the said Koenigsberg had discontinued all connection with the Consolidated Ice Machine Company, or Robert E. Jenkins, its assignee, and had engaged in the sale of refrigerating machines on his own account, purchasing the same from John Featherstone's Sons, a manufacturing corporation of Chicago, Illinois, which was a large creditor of the Consolidated Company, and which, at the date of the assignment, had sixteen (16) machines completed, or nearly completed, under the contract theretofore made with the Consolidated Ice Machine Company; and, by an agreement under order of court, these machines were abandoned by the assignee, and Featherstone's Sons proceeded to sell the same. That said Koenigsberg became the lessee on his own account, prior to said date, of the New York office of said Consolidated Ice Machine Company, and was so prosecuting his business when, on the 1st day of May, 1891, he entered into a contract with the De La Vergne Refrigerating Machine Company—a copy of which is hereto attached, marked "Exhibit C;" which contract was subsequently, on November 1st, 1892, annulled, and a new contract entered into between the same parties on the same date,—a copy of which is hereto attached marked, "Exhibit D." That during the existence of said contracts, said Joseph Koenigsberg bought of John Featherstone's Sons seven (7) refrigerating machines of the pattern or type known as "Consolidated ice machines," which (are) billed to him personally, he being the only person known in the transaction by John Featherstone's Sons; but in fact, the De La Vergne Refrigerating Machine Company advanced all the money that was required from time to time to pay for the machines so purchased by said Koenigsberg, he paying Featherstone's Sons with his own checks. That these machines were disposed of from time to time by contracts entered into between the several purchasers and Joseph Koenigsberg, personally; the performance of which contracts was, in each instance, guaranteed by John C. De La Vergne, and the contracts immediately after their execution were assigned to the De La Vergne Refrigerating Machine Company. There is no evidence that the purchasers in any case knew of this arrangement between Koenigsberg and John C. De La Vergne or the De La Vergne Refrigerating Machine Company. The (necessart) pipe and other materials for the erection of these several machines were purchased by Koenigsberg in his own name from various parties dealing in such materials in the open market, and paid for by him with his own checks, as were also the necessary services of engineers, laborers, etc., the money in each instance being advanced to him by the De La Vergne Refrigerating Machine Company. The said Koenigsberg also, on September 14th, 1891, after he had made the contract heretofore referred to, published an advertisement in the "Brewers' Journal"—a copy of which is hereto attached, marked "Exhibit F." That he also used a card prepared under the supervision of the attorneys of the De La Vergne Refrigerating Machine Company, in the form indicated by the letter of Hubert A. Ban-

ning, one of these attorneys, to Ashbel P. Fitch, the general counsel of the company, under date of September 15th, 1891—a copy of which is hereto attached, marked "Exhibit G."

X.

The type of machines built by the Consolidated Ice Machine Company prior to its insolvency, and by Featherstone's Sons under contract with said company, and disposed of in the manner described in the last paragraph, were not protected or covered by any patents except a patent known as the "Boyle patent," relating to the removable cage of the portion of one machine known as the "compressor," by which in the event of a breakage in the valves of the machine, new valves could be immediately substituted, and the damage done by a cessation of the process of refrigerating (which in many instances would be great) thereby avoided. The ownership of this patent had been acquired by the De La Vergne Refrigerating Machine Company in 1888, and was the subject of controversy prior to the failure of said Consolidated Ice Machine Company and during the period of the insolvency. The ownership of said patent has since been adjudged to belong, at the time mentioned, to the De La Vergne Refrigerating Machine Company by the Supreme Court of the United States, though its validity as covering the process described is yet undetermined. Upon the evidence, the De La Vergne Refrigerating Machine Company, during all of said period, therefore, had the right to manufacture and sell the same type of machine as was manufactured by the Consolidated Ice Machine Company.

XI.

The attempt made by Mr. John C. De La Vergne, through Mr. Waters, to purchase the claims of the creditors, or a majority of them, at sixty cents (60%) on the dollar, was unsuccessful, and seems to have been abandoned on his part in the summer of 1891. In the meantime, the county court of Cook county, under whose orders the estate of the Consolidated Ice Machine Company was being administered, did, on the 4th day of May, 1891, enter an order for the sale of the manufacturing plant of said insolvent, including machinery, tools, patterns, drawings and good will, and also all stock on hand at the time of such sale, a copy of which order is hereto attached, marked "Exhibit H," and made a part thereof.

XII.

That in the meantime, John Featherstone's Sons, who had been doing all that was in their power to prevent John C. De La Vergne purchasing the claims of creditors against said insolvent, and who was represented in such efforts by Clarence A. Knight, Esq., an attorney and counsel of the bar of the State of Illinois, joined with certain other creditors in a plan to form a new corporation to purchase the assets under said order of sale, and engage in the business of manufacturing ice machinery; or, in the event that such a plan

could not be carried through, then to hold such assets and dispose of the same on the most favorable terms possible; and to that end entered into a so-called trust agreement on the 9th day of October, 1891, a copy of which trust agreement, marked "Exhibit I," is filed herewith and made a part thereof. That this trust (*agreeing*) more than a majority of the entire indebtedness of said Consolidated Ice Machine Company, including, among others, the German Savings Institution, F. Widmann, Leo Rassieur and Jacob W. Skinkle, who are plaintiffs in these consolidated causes, and at the same time Leo Rassieur was the agent and representative, in his personal or professional capacity, of all the other plaintiffs in these consolidated causes. That by the terms of this trust agreement, the same Clarence A. Knight and Otto C. Butz were constituted trustees for the creditors so signing the agreement, as under the terms and with the powers set forth in said trust agreement.

XIII.

That at the sale under the order of court heretofore referred to the said Knight and Butz as trustees, became the purchasers of all the assets ordered to be sold by the court, including the good will, patterns etc. of the Consolidated Ice Machine Company, insolvent; which sale was duly confirmed by the court on the 2nd day of December, 1891, pursuant to the order duly entered in said court—a copy of which marked "Exhibit J," is filed herewith and made a part thereof.

XIV.

That at the said sale, the De La Vergne Refrigerating Machine Company was a bidder, but offered only the sum of twenty-five thousand dollars (\$25,000).

XV.

That the creditors so purchasing the property, and their trustees, did not avail themselves of the right contained in the trust agreement to organize a new company and prosecute the business of said insolvent, but, on the contrary, seem to have abandoned that project, and on the 30th day of January, 1892, made a conditional sale of said assets to John Featherstone's Sons by which the title to said assets, and of all ice machinery, or parts of machines, to be sold by John Featherstone's Sons until certain payments in the agreement of sale should be made, was to remain in and be done in the name of the said trustees. A copy of said agreement, marked "Exhibit K," is filed herewith and made a part thereof.

XVI.

That the business was so prosecuted, under the terms of said agreement, from the date of said sale (January 30th, 1892), until the 10th day of May, 1892, when the said Featherstone's Sons availed themselves of the option contained in said agreement to make an earlier payment and receive an absolute title of the property.

XVII.

That neither John C. De La Vergne nor the De La Vergne Refrigerating Machine Company ever acquired or received any part of the assets of any kind or description of said Consolidated Ice Machine Company, and that the only delivery of any kind or description that was ever made by the parties of the first and second parts to the contract of April 16th, 1891, was of certain shares of stock owned by the several parties of the second part to said contract, and delivered as more particularly described in the next paragraph and the document therein referred to.

XVIII.

That thereafter, the defendant in these actions, having neglected and refused to deliver to the several parties of the second part in said contract of April 16th, 1891, (the plaintiffs in these actions) the stock agreed to be delivered under the terms of said contract, these actions were brought; and thereafter, upon the trial thereof, an agreed statement of facts was entered into, in words and figures as follows, to wit:

In the above-entitled cause, it is hereby stipulated and agreed, by and between the several plaintiffs to said several causes, and the several defendants therein, that the said causes shall be taken by the court as submitted upon the pleadings and the following statement of facts:

That the defendant, The De La Vergne Refrigerating Machine Company is, and at all times covered by the pleading was, a corporation organized under the laws of the State of New York, 382 with its chief office in the city of New York in said State, and the defendant John C. De La Vergne is, and at the time when these suits were brought was, a resident of the city of New York in said State. That on the 14th day of October, 1890, the Consolidated Ice Machine Company was a corporation organized under the laws of the State of Illinois and was engaged in the manufacture and sale of refrigerating and ice-making machines. That Exhibit One is the original certificate of papers of its incorporation, and correctly sets forth the subscriptions for stock which were made and reported to the secretary of state before said certificate (or) organization was issued. That on the 14th day of October, 1890, said Consolidated Ice Machine Company made a general assignment for the benefit of its creditors to one R. E. Jenkins, and that at the time of said assignment the capital stock of said Consolidated Ice Machine Company consisted of two thousand shares of the par value of one hundred dollars each, of which said two thousand shares, five hundred subscribed and held by W. B. Bushnell had been forfeited to the company for non-payment of assessments; the five hundred subscribed by him to sell to workmen in the Consolidated Ice Machine Company, but were never sold or paid for, and that no certificate had ever been issued for them by said corporation, and that the remaining one thousand shares at said time were fully paid and

appeared on the books of the company, and certificates for them were issued, transferred and held as follows :

(1.) Twenty-five shares represented by certificate No. 17 of said Consolidated Ice Machine Company; issued to Leo Rassieur and P. J. Lingenfelder, executors, and appearing in their names upon the books of the company, which certificate had been indorsed by them and thereupon delivered to said German Savings Institution as collateral security.

(2.) Leo Rassieur, 200 shares; represented by certificates Nos. 5, 6, 7 and 8, each for fifty shares, issued to said Leo Rassieur, and appearing in his name upon the books.

Anna, or Annie Jungenfeld, 70 shares; represented by certificate number twelve, and appearing in her name upon the books.

Jacob W. Skinkle, 250 shares; these shares appeared in his name upon the books of the company; the certificate for them he had theretofore delivered as collateral security for an indebtedness which he owed to the Merchants' national bank, and said bank had delivered said certificate to him with power to make the contract hereinafter referred to in his name, said shares being represented by certificate No. 4.

383 Edward Mallinckrodt, 225 shares; represented by certificate No. 16, and appearing in his name on the books.

Ninety shares appearing on the books of the company in the name of E. Jungenfeld and represented by certificate No. 15; Leo Rassieur and P. J. Lingenfelder were at said time the duly appointed and qualified executors of the estate of E. Jungenfeld, deceased.

Leo Rassieur and P. J. Lingenfelder, trustees of Carl Jungenfeld, 70 shares; represented by certificate No. 13, and appearing in their names upon the books of the company.

Frederick Wideman, 70 shares; represented by certificate No. 18, and appearing in his name upon the books of the company.

That the assets assigned by said Consolidated Ice Machine Company to said Jenkins consisted in the main of a plant for the manufacture of its machines, located in the city of Chicago, Illinois, of patent rights, outstanding accounts, and the good will of its business, in which it had been engaged constantly for about six years. That at said time and for some time prior thereto, the De La Vergne Refrigerating Machine Company was also engaged in the manufacture and sale of refrigerating and ice-making machines, and defendant, John C. De La Vergne, was the principal stockholder and the president thereof.

That on the 16th day of April, 1891, the defendants, De La Vergne and The De La Vergne Refrigerating Machine Company and said Consolidated Ice Machine Company, and said several plaintiffs did enter into a contract in writing of which the following is a copy :

(Here follows contract of April 16th, 1891, which is omitted here, having been heretofore set out as "Exhibit A" to this finding of facts.)

It is further agreed that subsequently, to wit, on the 23rd day

of April, 1891, Leo Rassieur addressed a letter to Joseph Koenigsberg, a copy of which is as follows:

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"APRIL 23D, 1891.

Mr. Joseph Koenigsberg, No. 213 E. 54th street, New York city,
N. Y.

DEAR SIR: Inclosed please find certificates of Consolidated I. M. Co., as follows:

No. 17 to Leo Rassieur and P. J. Lingensfelder.....	25 shares
" 6 to Leo Rassieur.....	50 "
" 8 to Leo Rassieur.....	50 "
" 7 to Leo Rassieur.....	50 "
" 5 to Leo Rassieur.....	50 "
" 12 to Anna Jungensfeld.....	70 "
" 4 to Jacob W. Skinkle....	250 "
" 16 to Edward Mallinckrodt.....	225 "
" 15 to E. Jungensfeld estate.....	90 "
" 13 to L. R. and P. J. L. for Carl Jungensfeld.....	70 "
" 18 to F. Widman.....	70 "
	<hr/>
	1,000 "

which please hand on Saturday, April 25th, to Mr. De La Vergne in person, this being the last day.

Yours very truly,

LEO RASSIEUR."

That in this letter were inclosed certificates of stock of the Consolidated Ice Machine Company, with certain indorsements thereon, the originals of which are hereto attached and marked Exhibits 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12.

That the signature to the transfer of certificate No. 4 is that of J. W. Skinkle, plaintiff in case No. 3726; that the signature to transfers of certificates Nos. 5, 6, 7 and 8, is that of Leo Rassieur, plaintiff in case No. 3695; that the signature to transfer of certificate No. 12 is that of Anna Jungensfeld, plaintiff in case No. 3700; that the signatures to transfers of certificates Nos. 13, 15 and 17 are the handwriting of Leo Rassieur alone; that the signature to the transfer of said certificate No. 16 is that of Edward Mallinckrodt, plaintiff in case No. 3698; that the signature to transfer of certificate No. 18 is that of Fred Widman, plaintiff in case No. 3696.

That on the 25th day of April, 1891, said letters from Leo Rassieur to Joseph Koenigsberg of 23rd day of April, 1891, together with said inclosures *was* received by said Koenigsberg; and that on said same 25th day of April, 1891, said Koenigsberg handed all certificates of stock in the Consolidated Ice Machine Company indorsed as aforesaid, to defendant John C. De La Vergne; and

385 that said John C. De La Vergne thereupon made upon the margin of said letter on the 23rd day of April, 1891, the following indorsement:

"4, 25, '81.

Received the above-described stock from the hand of J. Koenigsberg.

JOHN C. DE LA VERGNE."

That on the 27th day of April, 1891, Ashbell P. Fitch, attorney for defendant John C. De La Vergne, wrote and mailed to Leo Rassieur the following letter.

"APRIL 27TH, 1891.

Leo Rassieur, southwest corner Fourth and Market Sts., St. Louis, Mo.

DEAR SIR: Mr. De La Vergne has submitted to me the transfer of certificate No. 17 of 25 shares of the Consolidated Ice Machine Company, issued to you and Mr. Lingenfelder as executors of Edmund Jungensfeld's estate, dated September 11th, 1889.

These shares are transferred by the signature of P. J. Lingenfelder and Leo Rassieur, executors of Ed. Jungensfeld, deceased, which, of course, would be regular. In the body of the assignment, however, are the words 'to John C. De La Vergne by direction of the German Savings Institution, owner hereof.'

It seems to me that the statement that the German Savings Institution is owner of the shares of stock is notice to Mr. De La Vergne of their ownership in such form as would bind him. It seems to me further that if the German Savings Institution are the owners of the certificate, and Mr. De La Vergne has been notified thereof, that the signature of the executors of the Jungensfeld estate is insufficient to transfer the certificate of Mr. De La Vergne unless he holds some ratification of the transfer by the German Savings Institution.

I suppose there would be no difficulty in our getting some memoranda, signed in the proper form by the institution, to the effect that they recognize and approve the transfer of this certificate to Mr. De La Vergne.

There are also several other matters to which I would like to call your attention in this connection. The signature of the holders of the various certificates to the transfer of the same are not witnessed except in two cases: Mr. Skinkle's certificate No. 4, for 250 shares, is witnessed in lead pencil, and the Anna Jungensfeld certificate No. 12 for 70 shares is witnessed by Marguerite Von Jungensfeld.

The stock of Jungensfeld estate is transferred by P. J. Lingenfelder and yourself, as executors, and I assume that the names of both executors were signed by you, probably on some authority which does not appear on the face of the paper.

386 This is also the case in regard to certificate No. 13 for 70 shares held by Mr. Lingenfelder and yourself, as trustees of Carl Lingenfelder (*sic*).

There is also a clause printed on the back of the stock in such a way as to be notice to us, which reads as follows:

The holder of any stock who desires to sell the same or any part thereof, shall be required to tender such stock to the company, and to the stockholders thereof, at par for a period of sixty days, and

shall only have the right to sell the same in open market after the company and its stockholders have declined to purchase the same.

I desire to suggest to you that the different questions raised by the facts which are mentioned above might be covered by some agreement signed by all the stockholders, reciting that such a tender had been made to them and to the company, and declined, or that with knowledge of their rights in the premises, the different stockholders had waived this requirement and that this agreement might recite the sale of this stock to Mr. De La Vergne and be signed by Mr. Lingenfelder in his capacity as executor and in his capacity as trustee, and that it might also contain some recital and signature which would cover the question of the witnessing of the different transfers. These are suggestions as to how this can be covered. Of course you will understand that in one way or another it will be necessary for me to have these points satisfactorily covered. This seems to me to be doubly necessary because it appears on the face of the papers that there is an estate and trust involving minor children and some of the stock is in the name of a lady, and you know how necessary it is under such circumstances to be certain to get the papers right while the people are all alive and while the transaction is known to us all.

Yours sincerely,

(Signed)

ASHBELL P. FITCH."

Which letter was received by said Leo Rassieur on the 29th day of April, 1891. That on said 29th day of April, 1891, Leo Rassieur replied to said A. P. Fitch in the following letter.

"St. Louis, April 29th, 1891.

A. P. Fitch, Esq., att'y-at-law, 93 Nusseau street, New York city, N. Y.

DEAR SIR: In reply to your favor of the 29th inst. which came to hand today, I write to inform you that I shall comply with the request made therein by you.

The fact that all the stockholders have transferred to Mr. De La Vergne under an agreement joined in by the company, seemed to me sufficient to be construed as a waiver of that portion of (our)

387 by-laws which requires that the stock should first be offered to the company and then to the stockholders thereof but in order that every question may be fully disposed of to your entire satisfaction, I will have signed such an agreement as you suggest and have it signed by all the stockholders, providing you will prepare same and send it on.

Miss Anna Jungensfeld is not in this country, and hence such a signature as may be required of her will have to be made by her attorney-in-fact, Herman A. Haeussler, Esq.

With a view to covering the two points suggested by you concerning the German Savings Institution stock and that which is held by Dr. Lingenfelder and myself as executors and trustees, I herewith inclose assignment made by them duly witnessed.

Yours very truly,

(Signed)

LEO RASSIEUR.

P. S.—I also inclose my copy of original agreement duly ratified upon receipt of which please send me Mr. De La Vergue's copy.
L. R."

And that in said letter were inclosed three powers of attorney all signed by the persons or parties whose names are attached thereto, and in language as follows:

"Know all men by these presents, that we, P. J. Lingenfelder and Leo Rassieur, as executors of the estate of Edmund Jungenfled, deceased, of the city of St. Louis, State of Missouri, do hereby constitute and appoint ——— our true and lawful attorney for us and in our names and behalf to sell, assign and transfer to John C. De La Vergue, Esq., our ninety (90) shares to us belonging in the capital stock of the Consolidated Ice Machine Company, evidenced by certificate No. 15 of said company, and for that purpose to make all necessary acts of assignment and transfer.

In witness whereof, we have hereunto set our hands and seals this twenty-third day of April, 1891.

(Signed)

P. J. LINGENFELD, [SEAL.]
Executor Ed. Jungenfled, Deceased.

(Signed)

LEO RASSIEUR, [SEAL.]
Executor Ed. Jungenfled, Deceased.

Executed in the presence of—

(Signed) HUGO MUENCH.

2. Know all men by these presents, that the German Savings Institution, a banking corporation of the city of St. Louis, State of Missouri, does hereby constitute and appoint Hon. Ashbell P. Fitch its true and lawful attorney for it and in its name and behalf, to sell, assign and transfer unto John C. De La Vergue, Esq., its twenty-five shares (25) to it belonging in the capital stock of the Consolidated Ice Machine Company, evidenced by certificate No. 17 of said company, transferred by P. J. Lingenfelder and Leo 388 Rassieur, executors (in whose name the same appeared on the books), by its directions — the said John C. De La Vergue, and for that purpose to make all necessary acts of assignment and transfer.

In witness whereof the said German Savings Institution has hereunto caused its cashier to affix his hand and its corporate seal this twenty-third day of April, 1891.

(Signed)

GERMAN SAVINGS INSTITUTION.

[SEAL.]

RICHARD HOSPEL, *Cashier.*

Executed in the presence of—
— — —

3. (Know) all men by these presents, that we, P. J. Lingenfelder and Leo Rassieur, as trustees of Carl Jungenfled, a minor, under the will of Edm. Jungenfled, deceased, with full power of disposition over the assets in our hands, of the city of St. Louis, State of Missouri, do hereby constitute and appoint ——— our true and

lawful attorney for us and in our names and behalf to sell, assign and transfer unto John C. De La Vergne, Esq., our seventy (70) shares to us belonging, in the capital stock of the Consolidated Ice Machine Company, evidenced by No. 13 of said company, and for that purpose to make all necessary acts of assignment and transfer.

In witness whereof we have hereunto set our hands and seals this twenty-third day of April, 1891.

(Signed)

P. J. LINGENFELDER, [SEAL.]
Trustee Carl Jungensfeld, a Minor.

(Signed)

LEO RASSIEUR, [SEAL.]
Trustee Carl Jungensfeld, a Minor."

Executed in presence of—

(Signed) HUGO MUENCH. [SEAL.]

But that said powers, though purporting to be executed on the 23rd day of April, 1891, were not actually executed until after the 25th day of April, 1891. That in the month of July and later, demand was made by Leo Rassieur on J. C. De La Vergne for stock provided for in the agreement of April 16th, 1891, and after said several demands, Ashbell P. Fitch, attorney for John C. De La Vergne, wrote and mailed to Leo Rassieur on September 12th, 1891, the following letter :

"SEPTEMBER 12TH, 1891.

Leo Rassieur, Esq.

DEAR SIR: I am just out again after a long illness which prevented my attending to any business for many weeks, and am handed now some letters of yours to Mr. John C. De La Vergne, dated in July and August, in regard to the matters pending between you and others and Mr. De La Vergne, of which I have charge for him.

389 These letters request the delivery of certain stock of the De La Vergne Company under a contract made April 16, 1891, between the Consolidated Ice Machine Company and others, and Mr. De La Vergne.

On examining the contract and correspondence, it seems to me that under the contract you were bound within ten days from the date of the contract to fully and properly assign to Mr. De La Vergne all of the stock of the Consolidated Ice Machine Company which had been issued, and it seems to me further that it is clearly shown by my letter of April 27, 1891, to you and your reply April 29, 1891, and by other evidence that this was not done in time in accordance with the contract.

I am also informed that litigation which has during my illness arisen in the State of Illinois in regard to the charter of the Consolidated Company would affect the right of the stockholders or of the company to carry into effect such a contract as that of the 16th of April, 1891, even if the stockholders and the company were not in default under the contract as it seems to be they plainly are.

I am also informed that there is some question in litigation and

otherwise affecting the ownership of the stock of the Consolidated Company.

Pending further information on these points, I have still in my possession the papers which you have sent me, and sent to Mr. De La Vergne, which of course (if) my views as above expressed are correct, I am ready to pass over to whoever is legally entitled to the custody of the same, which is a question which I am not willing personally to decide.

I shall be obliged if you will write to me and explain how far my conclusions above mentioned seem to you to be well founded, and also what from your point of view the present legal status of the Consolidated Company now is.

I am informed that the attorney general of the State of Illinois has taken action which must result in the dissolution of the corporation.

I am not yet able to take up my regular work, and am going to Sharon Springs for a couple of weeks, but any letters sent to my office by you will be forwarded to me.

I regret to learn from your correspondence submitted to me that you have also been ill and hope that you have fully recovered.

Yours sincerely,

(Signed)

ASHBELL P. FITCH."

Which letter was received by Leo Rassieur on September 16, 1891.

It is further agreed that all the stock which Leo Rassieur and P. J. Lingenfelder attempted to transfer, either as trustees or
390 as executors, excepting the 25 shares represented by certificate No. 17, belonged to said E. Jungenfeld at the time of his death and was derived from the estate of Edmund Jungenfeld, deceased, and that said 25 shares represented by said certificate No. 17 was acquired by Leo Rassieur and P. J. Lingenfelder, executors, in payment of a debt owing by Joseph Koenigsberg to said E. Jungenfeld at the time of his death, and that the authority of Leo Rassieur and P. J. Lingenfelder, if they had such authority either as executors (of) the estate — Edmund Jungenfeld, deceased, or as trustees of Carl Jungenfeld, to sell, exchange or transfer shares of stock in the Consolidated Ice Machine Company, is to be found in the last will and testament of Edmund Jungenfeld, deceased, which is as follows:

"Know all men by these presents, that I, the undersigned, Edmund Jungenfeld, being of sound mind and disposing mind and memory, do make, and declare and publish the following as and for my last will and testament, to wit:

Firstly. It is my wish and will that my mother shall act as the guardian of the person and estate of my daughter Anna who is now in her care.

Secondly. It is also my wish and will that my friends, Louis P. Wilkins and Leo Rassieur shall be appointed as the guardians of the person of my son Carl during his minority.

Thirdly. I desire my estate both real and personal to be divided into three equal shares or parts, and I give, bequeath and devise

one undivided third thereof or one share to my daughter Anna, one share to my friends, P. J. Lingenfeld and Leo Rassieur as trustees of my son Carl, and the remaining share to Sophie Sander, who has for many years faithfully served me and my family and whose services I desire to acknowledge in a substantial manner.

To have and to hold the said respective shares unto the said Anna, my daughter, and to the said Sophia Sander and unto their heirs and assigns forever, and unto the said Lingenfelder and Rassieur as trustees for my son Carl, and unto their assigns and successors, in the trust hereby created, under the terms and conditions hereinafter set forth.

The said trustees shall retain control of, manage and invest said fund until my son arrives at the age of twenty-eight (28) years when he shall be entitled to the same. My said trustees shall be required to provide him with the means to continue his education, and also provide him with all necessities; they shall furthermore make him such further allowances and payments as they may deem for
391 his benefit and advantage, having due regard to the use to which the same are to be put and the capacity of my son to take care of such means as may be entrusted to him by my said trustees. My son shall at all times be privileged to require that annual accounts of his estate be rendered him and in default of such accounting, the circuit court of St. Louis city is empowered upon his petition or the petition of any friend to remove my said trustees and appoint one or more trustees in their places.

My said trustees shall have full power to convey, bargain and sell or lease any and all real estate that they possess and hold as part of said trust fund, and also have power to invest any and all funds in their charge as they may deem proper and profitable for their said trust estate.

Fourthly. I hereby nominate and appoint as executors of this will my said friends, P. J. Lingenfelder and Leo Rassieur, and also request that no bond be required of them in the discharge of their said duties. I give my executors full power to sell, convey and transfer any part or portion of my estate if they deem it for the advantage of those interested as legatees.

I also authorize and empower them to make any payments that I may owe on stock held by me in any incorporated company, particularly, however, the unpaid portion of my stock in the Consolidated Ice Machine Company of Chicago.

In witness whereof, I have hereunto set my hand at St. Louis city this nineteenth day of December, A. D. 1884.

(Signed)

EDMUND JUNGENSELD.

Signed, declared and published as and for his last will and testament by the above-subscribed Edmund Jungenseld, in our presence and in the presence, who at his request, in his presence and in the presence of each other have hereunto subscribed their names as witnesses thereof:

P. J. LINGENSELD.

MARY JOESEL.

WILHELM LEWITS.

LEO RASSIEUR.

Which said will has been duly probated in the probate court, city of St. Louis, Mo., and under which will Leo Rassieur and P. J. Lingenfeld duly qualified as executors.

It is further agreed that neither of the plaintiffs mentioned in this agreement ever furnished or offered to furnish defendants or either of them certificates of stock in the Consolidated Ice Machine Company issued in the name of John C. De La Vergne, and that no effort of any kind was ever made to deliver any stock in the Consolidated Ice Machine Company as contemplated in the said agreement of April 16th, 1891, except as hereinabove stated.

392 That no order of court was ever made to authorize Leo Rassieur and P. J. Lingenfelder or either of them, either as executors or as trustees, to make the sale or transfer of stocks contemplated by the said contract of April 16th, 1891. That when Ashbell P. Fitch wrote to Leo Rassieur on the 27th day of April, 1891, and thereafter and at all times herein mentioned said Leo Rassieur was the duly authorized agent and attorney of the parties plaintiff herein.

That the provision printed on the certificates of stock hereto attached as Exhibits 2 to 12 inclusive as part of the by-laws of said Consolidated Ice Machine Company was in fact a part of said by-laws.

It is further agreed that defendants did not within sixty days after the said 25th day of April, 1891, nor did they at any time before or since, issue or deliver to any of the plaintiffs any stock whatever in the defendant company, nor in any other company, nor have they at any time paid any of the plaintiffs any cash money in lieu of stock, although, as is also admitted to be a fact, plaintiffs have demanded of the defendants the one or the other.

It is further agreed that on the 9th day of October, 1891, an agreement was entered into between creditors of the Consolidated Ice Machine Company whose claims amounted to over three hundred thousand dollars, looking to the purchase of a part of the assigned property of said Consolidated Ice Machine Company including its plant and machinery. That of the parties plaintiff herein Fred Widman, J. W. Skinkle, Leo Rassieur and German savings institution were at the time creditors of said company and as such joined in said agreement. That in pursuance of said agreement two trustees named therein did purchase and acquire for said creditors said entire plant and machinery assigned by said Consolidated Ice Machine Company for about seventy thousand dollars, and that said trustees thereafter sold said plant and machinery for the benefit of all the said creditors named in said agreement for about \$75,000; but that said plant and machinery were never operated by said trustee or by said creditors or any of them.

It is further agreed that (neither) party may read from the Revised Statutes of Illinois, 1891 (Hurd's), or from any other authentic revision or publication, in evidence in these causes such portions of the statutes and laws of the State of Illinois as he deems relevant to the issues, subject to objection for relevancy and the matter so read shall be treated as if set forth in this agreement of fact."

And I find that the facts set forth in the said agreed statement of facts were truly set forth except as they are modified or changed by findings heretofore set out herein.

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XIX.

The trial upon this agreed statement of facts resulted in judgment for the defendant; from which judgment an appeal was taken to the United States circuit court of appeals, eighth circuit, (*with*) judgment was reversed, and the cause remanded with directions to grant a new trial. The defendants amended their answers and took testimony in New York and Chicago, upon which and the agreed statement of facts these findings are based, as the plaintiffs offered no testimony upon the trial.

EXHIBIT A.

This agreement made and entered into this sixteenth (16th) day of April, 1891, by and between the Consolidated Ice Machine Company, a corporation of the city of Chicago, and State of Illinois, party of the first part, Jacob W. Skinkle, Edward Mallinckrodt, Leo Rassieur, Annie Jungensfeld, Frederick Widman, acting in their own right, P. J. Lingenfelder and Leo Rassieur, as executors of the estate of Edmund Jungensfeld, deceased, and as trustees of Carl Jungensfeld, a minor, and the German Savings Institution, a banking corporation of the State of Missouri, who are the owners of the issued stock of said The Consolidated Ice Machine Company, and control the unissued stock thereof by virtue of such ownership, parties of the second part, the De La Vergne Refrigerating Machine Company, a corporation of the city of New York in the State of New York, party of the third part, and John C. De La Vergne of the city of New York, party of the fourth part.

Witnesseth: Whereas the said party of the first part on the fourteenth day of October, 1890, made an assignment for the benefit of its creditors to R. E. Jenkins, who is now engaged in winding up its affairs, and whereas further the assets of said party of the first part in the opinion of the said parties of the second part, exceed in value the liabilities thereof, and consist in part of the good will of said party of the first part (which good will has been established by six years of successful manufacture of refrigerating and ice-making machines, together with an expenditure of the earnings from such manufacture), and whereas the said party of the third part is willing to acquire such rights as the said parties of the first and second parts can assign in and to the said assets, subject to the obligations of said party of the first part; and whereas further, under the laws of the State of Illinois, under which the assignment aforesaid has been made, the said party of the first part is not entitled to the possession of its assets in the hands of the assignee aforesaid, until its obligations have been complied with and discharged, or the major-

394 ity in number and amount of its creditors, have signified-
their willingness to the court having jurisdiction of said as-
signment, and an order has been obtained therefrom to have
the said assets transferred and delivered by said Jenkins to the said
party of the first part, or its assigns, and whereas further, the said
party of the third part is now incorporated under the laws of the
State of New York with a full-paid capital stock of only three hun-
dred and fifty thousand (350,000) dollars, divided into three thou-
sand five hundred (3,500) shares of one hundred (100) dollars each,
par value, and its net assets, in the opinion of the said party of the
fourth part are fully worth the sum of one million four hundred
thousand dollars; and whereas the said party of the third part and
its stockholders are now considering a plan of so increasing the
stock of said company as will enable said company to have a full-
paid capital of two million (2,000,000) dollars, one million four hun-
dred thousand (1,400,000) dollars of which stock is to be issued to
its present stockholders, 100,000 to the stockholders of the Consol-
idated Ice Machine Company under the terms of this agreement,
and the remaining five hundred thousand (500,000) dollars of stock
to be disposed of in the market at not less than par, and the pro-
ceeds of such at par to become part and parcel of the assets of said
De La Vergne Refrigerating Machine Company, the said party of
the third part, such plan of increasing the stock of said party of the
third part to be carried out either by an increase of stock, under the
laws of the State of New York or by the organization of a new com-
pany, under the laws of the State of New Jersey, or some other State
for the purpose of the purchasing of the assets and good will of the
party of the third part.

Now, therefore, in view of the premises, and for and in consid-
eration of the mutual advantages to be gained by the execution of
this contract:

First. The said party of the first part and the said parties of the
second part, agree and covenant to and with the said parties of the
third and fourth parts to bargain, sell and convey, and by these
presents do bargain, sell and convey unto the said party of the third
part, all their right, title and interest in and to the assets of the said
party of the first part, subject to the payment of its obligations, and
subject to the custody thereof in the legal custodian, R. E. Jenkins,
assignee, as aforesaid.

Second. The said parties of the third and fourth parts covenant
and agree to and with the said parties of the first and second parts
to issue unto the said parties of the second part full-paid stock in
the said party of the third part to the amount of one hundred thou-
sand dollars (\$100,000.00), and which stock so to be issued shall be
issued unto the said parties respectively in the following propor-
tions, to wit:

395	To J. W. Skinkle	50
	To Edward Mallinckrodt	250
	To Leo Rassieur	45
	To Annie Jungenfeld	200
	To German Savings Institution	200
	To P. J. Lingenfelder and Leo Rassieur as executors as aforesaid	14
	To P. J. Lingenfelder and Leo Rassieur as trustees as aforesaid	200
		18
		200
		200

Third. The said parties of the third and fourth parts covenant and agree that the net assets of the said party of the third part are fully worth one million four hundred thousand (\$1,400,000) dollars, not including the assets and rights purchased under this agreement, and that said stock in the De La Vergne Refrigerating Machine Company to be issued under this agreement to said parties of the second part shall represent not less than one-fifteenth ($\frac{1}{15}$) part of said assets, and that no additional stock be issued in the said company, or in the new company to be organized as hereinbefore set forth beyond one million, five hundred thousand (1,500,000) dollars par value, without actual value in the full amount being first received by said company, and the said parties of the third and fourth parts covenant and agree to and with the said parties of the second part, that said parties of the second part shall have the privilege of examining said assets of the party of the third part until the first day of August, 1891, for the purpose of verifying the statement made herein concerning the value of said assets, and that if it be ascertained that the actual value of said assets is not in accordance with the covenant hereinbefore set forth, then the said parties of the second part shall have the privilege and right of demanding that said stock so to be issued to them be made to accord with the covenant aforesaid, regarding value, and the said parties of the third and fourth parts covenant and agree to make said stock represent the value aforesaid; and it is further covenanted by and between the parties, that any examination made in good faith by the purchasers of at least one hundred thousand dollars (\$100,000.00) additional stock in said party of the third part, or in the new company to be organized for the purpose of acquiring the assets of said party of the third part shall be conclusive evidence upon the parties hereto as regards the net value of said assets, providing an opportunity be given to said party of the second part of being represented and taking part in the making of any such examination.

Fourth. For the purpose of placing the party of the third part in complete control of the assets of the party of the first part subject to the legal rights of said assignee, and the creditors of said party of the first part, the said parties of the second part agree within ten (10) days from the date hereof to assign to said party of the fourth part for the benefit of the said party of the third part, all the stock of said party of the first part, which has been issued and which they guarantee has been paid in full, and within sixty (60) days thereafter the said parties of the third

and fourth parts agree to issue and deliver to said parties of the second part in the proportions aforementioned the stock of the said party of the third part to the amount of one hundred thousand (100,000) dollars.

Fifth. The said parties of the second part covenant and agree to and with the said parties of the third and fourth parts to accept in lieu of the said stock in the said party of the third part, or of any successor to the said party of the third part, the sum of one hundred thousand (100,000) dollars in cash, at the option of said party of the fourth part.

Sixth. It is clearly understood by all the parties hereto that the said party of the third part by the acceptance of the above conveyance, does not make itself liable for any of the obligations and liabilities of the said party of the first part.

Seventh. The said parties of the second part covenant to and with the said parties of the third and fourth parts for a period of ten (10) years from the date hereof not to enter into or become connected with the sale of refrigerating or ice-making machines, directly or indirectly within the United States of North America, excepting the State of Montana, and excepting also the business of the said party of the third part, or of such company as becomes its successor and purchaser of all its rights.

In witness whereof the said parties of the second and fourth parts have hereunto set their hands and seals, and the said parties of the first and third parts have caused their respective presidents to affix their names on the day and date first hereinbefore written.

(Signed)

THE CONSOLIDATED ICE
MACHINE CO.,

[SEAL.]

By J. W. SKINKLE, *Pres.*

(Signed)

JACOB W. SKINKLE.

[SEAL.]

(Signed)

EDWARD MALLINCKRODT.

[SEAL.]

(Signed)

LEO RASSIEUR.

[SEAL.]

(Signed)

ANNIE JUNGENSELD,

[SEAL.]

By LEO RASSIEUR, *Her Att'y-in-fact.*

(Signed)

FRED WIDMAN,

[SEAL.]

By LEO RASSIEUR, *His Att'y.*

(Signed)

P. J. LINGENFELDER AND

LEO RASSIEUR,

[SEAL.]

Executors of the Estate of Ed. Jungenseld, Deceased.

397

(Signed)

P. J. LINGENFELDER AND

LEO RASSIEUR,

[SEAL.]

Trustees of Carl Jungenseld, Minor.

(Signed)

GERMAN SAVINGS INSTI-
TUTION,

[SEAL.]

By LEO RASSIEUR, *Its Att'y.*

(Signed)

THE DE LA VERGNE RE-
FRIGERATING MACHINE
CO.,

[SEAL.]

By JOHN C. DE LA VERGNE, *Pres.*

JOHN C. DE LA VERGNE.

[SEAL.]

I consent to the execution of above contract and ratify the same
(Signed) J. KOENIGSBERG.

I consent to the execution of above contract and ratify same.
(Signed) ANNA JUNGENSELD,
By H. A. HAEUSSLER, *Att'y.*

I consent to the execution of above contract and ratify same.
(Signed) F. WIDMAN.

Herewith I ratify the execution of the foregoing agreement by my co-executor and cotrustee, and adopt the same as my act as trustee and executor and consent to such sale and contract.

P. J. LINGENFELDER,
Executor of E. Jungensfeld's Estate.

P. J. LINGENFELDER,
Trustee for Carl Jungensfeld, a Minor.

The undersigned, German Savings Institution, herewith ratifies the execution of foregoing agreement and sale by Leo Rassieur, its attorney, and consents to said sale.

GERMAN SAVINGS INSTITUTION,
By RICHARD HOSPES, *Cashier.*

EXHIBIT B.

	Consolidated Co.'s estimate value of each asset as fol- lows :	H. W. Guernsey's estimate of value of each asset as follows :	April 20, 1870, J. Koenigsberg's es- timate of am't due.
Cash	12,343.85	12,343.85	
Cons. Ice Co. stock (of Chicago)	5,000.	5,000.	
World's Fair stock	200.	200.	
Acc'ts receivable	25,502.74	19,127.06	
Darley Park brewery (Baltimore)	15,340.55	14,000.	
Jos. Ebner, Vincennes, Ind.	8,000.	8,000.	
Hygienic Ice Co., Washington, D. C.	17,482.75	12,000.	17,000
Phila. Warehouse & Cold Storage Co.	71,800.	65,000.	73,500
Union Ice Mfg. Co., Pittsburgh, Pa.	35,631.50	35,631.50	36,000
International Packing Co., Chicago	8,143.19	8,143.19	
A. Winttet & Co., Bridgeport, Ct.	2,300.	2,000.	2,000
Trenton Hygienic Ice Co.	75,000.	60,000.	92,000
Consumers' " " " New York	56,000.	56,000.	54,000
Do. Pure Ice Co., Chicago	39,000.	34,000.	40,000
New York Steam Co.	34,000.	27,500.	42,000
Quincy Machet Cold Storage Co., Boston ..	16,372.46	16,372.46	17,000
Consumers' Ice Mfg. Co., Philadelphia	21,000.	18,000.	21,125
Consumers' Ice Co., Chester, Pa.	19,500.	16,000.	
Paul Weidmann, Brooklyn, N. Y.	13,125.	13,125.	
Anthony & Juhn, St. Louis, Mo.	3,000.	3,000.	
Fulton Ave. brewery, Evansville, Ind.	15,000.	12,000.	10,000
Midland Hotel Co.	4,183.79	1,500.	6,000
			Less 3,000
Machines in shop partly built as follows :			
75-ton horizontal machines	5,405.80	5,405.80	
75 " vertical do.	1,398.14	1,398.14	
25 " horizontal do.	840.15	840.15	
50 " ice do.	1,500.17	1,500.17	
150 " " do.	2,924.84	2,924.84	
35 " vertical do.	399.19	399.19	
Charges ag't unfinished contracts as fol- lows :			
Toledo Brewing & Malting Co., Toledo, O.	7,889.77	7,889.77	18,000
Joseph Doelger's Sons, New York	8,309.67	8,309.67	20,600
Paul Schoenhofen Br'g Co.	558.16	558.16	15,500
A. Tilger & Co., Duluth	501.93	501.93	12,000
Tennessee Brewing Co., Memphis	365.67	365.67	25,500
Eagle Brewing Co., Jersey City	7,980.04	7,980.04	19,500
Merchandise	76,509.18	57,381.89	
Bills receivable	22,185.54	22,185.54	
Tool account, as per accompanying inven- tory	3,439.97	3,439.97	
Machinery account	46,137.56	46,137.56	
Patterns "	17,693.80	None.	
Drawings "	12,383.18	None.	
Office furniture, Chicago and New York ..	2,045.39	1,000.	
Equity on unfinished contracts as per ac- companying estimate in detail	28,000.00	28,000.	
	744,898.98	635,161.55	521,775
Conrad Seipp Brewing Co., Chicago, Ill.			12,500
			534,275

	Consolidated Co.'s estimate.	H.W. Guernsey's estimate.
Acc'ts payable	181,868.98	181,868.98
Bills do.	362,916.74	362,916.74
Salary acc't.....	3,505.58	3,505.58
Leo. Nassien, cash, 13,000, services, 4,691.15..	17,691.15	17,691.15
Estimated cost to complete contracts, full am'ts of which have been charged to per- sonal acc'ts and appear in acc'ts receivable..	15,350.00	25,000.00
	581,332.24	590,982.45
	744,898.98	635,161.55
Assets.....	581,332.45	590,982.45
	163,566.53	44,179.10

Capital stock..... \$100,000

Divided as follows:

J. W. Schurble	25,000
L. Nassien	20,000
Anna Jaugenfeld.....	7,000
Jaugenfeld & Nassen, trustees for Jaugenfeld.....	7,000
Sophia Saude.....	7,000
E. Jaugenfeld est....	9,000
E. Mollniehead.....	22,500
L. Nassien and P. J. Jaugenfeld, ex'rs of E. Jaugenfeld est.	2,500

100,000

EXHIBIT C.

This agreement, made and entered into this first day of May, 1891, between the De La Vergne Refrigerating Machine Company, a corporation organized and doing business under the laws of the State of New York, party of the first part, and Joseph Koenigsberg, of the said city of New York, party of the second part, Witnesseth:

First. That the said party of the second part has agreed and hereby does agree faithfully and diligently to serve the said The De La Vergne Refrigerating Machine Company in its business, or in the business of the Consolidated Ice Machine Company, as he may be directed, for the period of three years from and after the first day of May, 1891, for the sum of four thousand (4,000) dollars per year, to be paid to the said party of the second part monthly, on or before the last day of each month.

And said party of the second part has further agreed that he will give his entire time and attention to the business to which he may be assigned by the party of the first part, and that he will not accept or attend to any employment of any kind, during the term of this agreement, other than that provided by this agreement.

400 Second. And the party of the first part has agreed and does hereby agree, in consideration of such services so to be rendered, to pay to the party of the second part the salary above stipulated at the time and in the manner above mentioned.

Third. It is agreed between the parties hereto, that in addition to the said salary of four thousand (4,000) dollars, above provided to be paid and accepted, the party of the second part shall receive from the party of the first part, in each year, the sum of five hundred (500) dollars whenever he shall have secured in that year for the said party of the first part, or for the Consolidated Ice Machine Company, if so directed by the party of the first part, orders accepted by the party of the first part amounting altogether to one hundred thousand (100,000) dollars.

And if the party of the second part in addition to procuring orders for one hundred thousand (100,000) dollars accepted by said party of the first part, shall in any year, during said three years and before the termination of this agreement, procure for the party of the first part, or for the Consolidated Ice Machine Company, if directed so to do by the party of the first part, additional orders amounting to the sum of one hundred thousand (100,000) dollars, also accepted by the party of the first part, he shall receive from the party of the first part an additional sum of five hundred (500) dollars.

The intent of this third clause of this agreement is that the party of the second part, on the faithful performance of this agreement on his part, shall receive in each year, during the existence of this contract, the sum of four thousand (4,000) dollars as salary, and the additional sum of five hundred (500) dollars for each one hundred thousand (100,000) dollars of business which he may procure to be accepted by the party of the first part up to the sum of two hundred thousand (200,000) dollars.

Fourth. It is understood and agreed that the death of the party of the second part, prior to the expiration of the said term of three years, shall terminate this agreement, and it is also agreed that in case the party of the second part shall be from any reason disabled from performing the duties to which he may be assigned by the party of the first part, for the period of three months, then at the expiration of the said term of three months this agreement shall, at the option of the party of the first part become null and void and of no value.

401 In witness whereof, the parties hereto have hereunto set their hands and seals the day and year first above written.

THE DE LA VERGNE REFRIGERATING
MACHINE COMPANY,

By JOHN C. DE LA VERGNE, *Pres't.* [SEAL.]
JOSEPH KOENIGSBERG. [SEAL.]

In presence of—
— — —

EXHIBIT D.

This agreement, made and entered into by and between the De La Vergne Refrigerating Machine Company, a corporation organized and doing business under the laws of the State of New York, and Joseph Koenigsberg, of the city, county and State of New York, witnesseth :

Whereas, a certain agreement, bearing date May 1st, 1891, has been existing between said parties relative to the sale of ice and refrigerating machines and plants, of what is known as the Consolidated pattern, by which said company assumed the responsibility of the contracts taken by said Joseph Koenigsberg.

And whereas, it is desired that said original agreement of May 1st, 1891, be abrogated, cancelled and annulled, except in so far as matters thereunder may not yet be settled up between the said Joseph Koenigsberg and said company, for which purposes the said agreement is in force, but not otherwise.

Now therefore, the parties hereto have agreed to and with each other that the said agreement of May 1st, 1891, shall be and is hereby terminated, except in so far as the same may involve matters incomplete or unsettled, which are hereafter to be disposed of and settled according to the terms of said agreement.

Second. The said Koenigsberg is hereafter to sell Consolidated refrigerating and ice-making machines and plants, and all appliances, connections and attachments to be used therewith or forming a part of the plants for refrigerating and ice-making purposes, including piping, etc.

Third. Said Koenigsberg is to purchase from the said The De La Vergne Refrigerating Machine Company such machines, or parts of machines and plants as he may hereafter desire, and
402 make contracts for them with said company at prices to be agreed upon, but he is to be privileged to make contracts elsewhere if more advantageous to him.

Fourth. The De La Vergne Refrigerating Machine Company is no longer to indorse the contracts taken by said Koenigsberg, nor to be in any manner responsible for carrying the same into effect, nor for collecting moneys due thereon, nor for damages arising from failures to complete said contracts, and otherwise, and in fact is to take no responsibility whatever in connection therewith.

Fifth. The De La Vergne Refrigerating Machine Company further agrees to pay to the said Joseph Koenigsberg a salary of four thousand dollars (\$4,000) per year for the period of one year from this date in equal monthly installments and in addition to said salary to pay the office expenses of said Koenigsberg, including a book-keeper, and such other incidental expenses as may pertain thereto, not exceeding eight thousand dollars (\$8,000) for the said period of one year, and the said company is to have the full and entire control of the book-keeper in said Koenigsberg's office and of the matters pertaining thereto which are at all times to be accessible to said company or its authorized representatives.

Sixth. The said Joseph Koenigsberg is to guarantee the said company by his bond in the sum of twenty-four thousand dollars (\$24,000), that the profits of his business for the said period of one year shall be double the expenses of his office and salary as hereinbefore provided, and all the said profits of the said business for said period shall be turned over to the said company as belonging to it as compensation for assuming his salary and the responsibility of his office expenses as aforesaid.

Seventh. In case the profits should amount to more than twenty-four thousand dollars (\$24,000) per annum, the salary of said Koenigsberg shall be one thousand dollars (\$1,000) more per annum, viz., \$5,000. The moneys collected by said Koenigsberg in excess of his necessary payments in carrying on the business shall be paid over to the De La Vergne Refrigerating Machine Company as collected.

Eighth. This agreement shall commence as of the first day of November, 1892, and end on the first day of November, 1893, and may be extended at the option of the De La Vergne Refrigerating Machine Company for the term of (6) months from said first day of November, 1893.

403 In witness whereof, the said company has caused these presents to be made, in its name, by its president, and with its corporate seal hereunto affixed, and the said Joseph Koenigsberg has hereunto set his hand and seal, all of which is done in duplicate at the city of New York, this first day of Nov. (1st) 1892.

THE DE LA VERGNE REFRIGERATING
MACHINE COMPANY,

By JOHN C. DE LA VERGNE, *Pres't.*

JOSEPH KOENIGSBERG.

[SEAL.]

EXHIBIT E.

NEW YORK, *September 14th*, 1891.

I take pleasure in announcing to the public, and particularly to my patrons who were customers of the Consolidated Ice Machine Company during the long period of my connection with that company, that I have recently made arrangements so as to be able to serve them in future. The De La Vergne Refrigerating Machine Company has for some time past been the owners of letters patent No. 175,020, which was granted to James Boyle, March 21, 1876, for gas compressors. This patent covers the style of compressor used on the machine which I have heretofore been engaged in selling. Having severed my connections with the Consolidated Ice Machine Company, which made an assignment October 14, 1890, I have now arranged with the De La Vergne Refrigerating Machine Company to build refrigerating and ice-making machines under the letters patent above referred to, and to furnish the same to such of my old patrons and to new customers as may desire to purchase them.

Trusting that you may favor me in the future with your orders,
I am,

Your obedient servant,

J. KOENIGSBERG.

containing 'works and principal offices,' etc., be changed, so as to read something like this: 'Built under the Boyle patent now known by the name of the De La Vergne Refrigerating Machine Company.' I wish you would go over these suggestions, and state what, if any objections you have or see to changing the card in the manner suggested, and if you think that it can be improved, make such changes as you think advisable.

"In the circular which you have agreed upon there is the sentence which reads as follows: 'Having severed my connection with the Consolidated Ice Machine Company, I have now arranged with the De La Vergne Refrigerating Machine Company,' etc. Mr. Koenigsberg wishes to insert after the words 'the Consolidated Ice Machine Company' the words 'which made an assignment on October 14, 1890' and I have advised him that I see no objection to this change. It has gone to the printers in this form, but if objectionable advise us at once.

"Yours truly,

HUBERT A. BANNING."

(EXHIBIT H.)

In the County Court of Cook County.

In the Matter of THE CONSOLIDATED ICE MACHINE COMPANY,
Insolvent.

It appearing to the court from the petition of Robert E. Jenkins, assignee of the Consolidated Ice Machine Company, an insolvent debtor, that the said petitioner as such assignee, has carried on and prosecuted the business of said company in pursuance of an order heretofore entered by this court, and has completed certain unfinished contracts and expects to be able to finish and complete all such unfinished contracts within the succeeding thirty days from the date of the entry hereof; that upon the completion of said contracts it will, in the opinion of said assignee, be unnecessary to longer continue said business or occupy the premises heretofore occupied by said insolvent; and that it will be for the interests of said insolvent and its creditors and stockholders and all parties in interest, upon the completion of said unfinished contracts, to sell and dispose of the manufacturing plant of said insolvent, including machinery, tools, patterns, drawings, and good will, and also all stock on hand at the time of such sale;

It is therefore ordered and decreed by the court that the said Robert E. Jenkins, as such assignee, be and he is hereby authorized and empowered to advertise and offer for sale for cash the
406 entire manufacturing plant of the said The Consolidated Ice Machine Company, including all machinery, tools, patterns, drawings, and the good will of said company, and also all stock remaining on hand at the time of such sale, to be inventoried and sold with said other property and assets of said insolvent; that said assignee is hereby authorized and empowered to advertise and offer for sale the said property as an entirety, including the present lease

hold interest of said premises occupied by said insolvent, which will expire on May 1st, 1893, together with the entire manufacturing plant, machinery, tools, patterns, drawings and good will, as aforesaid, and to cause an inventory of the stock on hand belonging to said insolvent to be made, and to advertise and receive bids for the said stock on hand so inventoried, and said plant, property and assets, up to twelve o'clock, noon, on Saturday, May 30th, 1891.

It is further ordered that said assignee reserve the right to reject any and all bids that may be so received by him, and that upon the receipt of any bid or bids up to the date aforesaid, the said assignee submit the same to this court with such recommendations with reference to the same as to him shall seem meet and proper and for the interests of said insolvent and its creditors, for such other, further, or final order thereon as to this court shall seem meet and proper.

And it is further ordered that said assignee have leave from time to time to apply to this court for such further or other order in connection with the advertisement and sale of said property as shall be deemed necessary and proper.

(Entered May 4th, 1891.)

EXHIBIT I.

This agreement, made and entered into this ninth day of October, A. D. 1891, by and between the undersigned creditors of the Consolidated Ice Machine Company, a corporation organized under the laws of the State of Illinois, which has made an assignment to Robert E. Jenkins, assignee, and whose assets are now being administered in the county court of Cook county, in the State of Illinois, witnesseth, as follows:

Whereas, by the inventory and report of the assignee of said estate, it appears that the plant formerly used by said insolvent is valued at \$130,000.00, and

Whereas, the only bid that has been received for said plant is the sum of \$66,000.00, and

Whereas, the claims due said insolvent are substantially all in litigation and it will take a long period of time to rescue the
407 said assets and divide the same among the creditors under the present proceedings, and

Whereas, it is necessary for the purpose of obtaining as much for the creditors of said insolvent as it is possible to obtain that some concert of action shall be taken on behalf of the creditors who desire to join herein, so that the parties joining herein will obtain a larger sum on their respective demands than would be the result if said insolvent proceedings were permitted to be carried on.

Now therefore, in consideration of the agreements herein contained, made by the undersigned, one with the other, and the further consideration of the sum of one dollar cash in hand paid by each of the undersigned parties to the other parties hereto, the receipt whereof is hereby acknowledged and confessed, the undersigned creditors of

said, The Consolidated Ice Machine Company, covenant and agree as follows:

First. We do hereby assign and set over all our respective claims and demands against said insolvent to Clarence A. Knight and Otto C. Butz, as trustees, and to their successors and assigns for the purposes hereinafter set forth and will make any other and further conveyances of said claims and demands that may be necessary to effectuate and carry out the purposes of this agreement, hereby giving unto said trustees jointly, but not severally, full power and authority to take any action that they may deem necessary or advisable for the purpose of realizing as large a sum as possible upon our respective claims and demands hereby giving them, said trustees, full power and authority to use our names and act in our place and stead in all matters pertaining to said claims and demands, with as full force and power as we might or could do if personally present, in acting thereunder, and hereby ratifying and confirming all that our said trustees may do in the premises.

Second. The amount of each claim shall be the amount as proved up and filed with the assignee of said insolvent, with interest to the date hereof, upon all the notes included in said claims, at 6% per annum. Provided, that if any claims shall be put in suit and judgment obtained on said claims then the amount of said claims shall be that as fixed by said judgment, and provided, that any claim to which exceptions have been filed in the county court, shall be passed upon and allowed by said trustees on the basis of this clause.

408 Third. Said trustees shall also have power to raise money for the purpose of purchasing claims against said insolvent, and may make such purchases in case any claimant shall decline to become a party to this agreement and for such purpose shall have power to use any funds, to which the several claimants will be entitled under any dividend to be paid by the assignee of said insolvent, or by said trustees.

Fourth. Said trustees shall also have power to bid in any or all of said assets of the said insolvent corporation in their own names as trustees for the benefit of the parties signing this agreement, and in case the said trustees purchase said assets then all of said assets so purchased shall be held by said trustees for the benefit of the parties who may sign this agreement, and said trustees shall have power to sell or dispose of said assets in such manner as they may deem advisable for the purpose of realizing on the same, and said trustees shall have full power and authority to compromise and settle, as in their judgment they may deem advisable, any claim which they may purchase as aforesaid, or they may, if they see fit, have power and authority to transfer said assets to any corporation that may be organized for the purpose of using said assets for the benefit of the parties hereto.

Fifth. In case the said trustees shall deem it advisable to form a corporation under the laws of the State of Illinois to carry on said ice machine manufacturing business for the purpose of realizing on said assets, so purchased of said assignee of said insolvent, then said trustees shall have the power and authority to transfer all or a part

of the assets so received by them as aforesaid to said corporation. Provided, all the stock in said corporation shall be held by said trustees for the use and benefit of all the parties to this agreement, and as soon as the claims of the parties to this agreement shall be paid in full then said trustees shall divide all the stock of said corporation held by them as such trustees *pro rata* (along) all the parties to this agreement, according to the amount of their respective demands. The shares of stock of said corporation shall be of the par value of fifty dollars (\$50.00) per share, and each claimant shall have one share of stock for every \$100.00 of his claim.

And provided, that if within one year from the date hereof the said trustees shall not have paid in full all the claimants who sign this agreement, then the said trustees shall distribute all of said remaining assets, including stock in said company, as provided aforesaid, and in any event shall close said trade within one year, and in case no corporation is formed, but said trustees collect in said assets, then said collections so made shall be distributed to the parties to this agreement as soon as said collections shall amount to 10% from time to time, of the amount of the respective claimants herein, 409 reserving, however, to said trustees the right to retain a fund to the amount of 10% of the claimants who sign this agreement, so that at no time shall said trustees hold in their hands more than the sum of 10% of the total amount of claims herein signed.

Sixth. In case said trustees shall form a corporation, then the capital stock of said corporation shall not exceed 50% of the total amount of the claims herein signed, and when said corporation so formed shall have collected any sum over \$50,000.00 in case they shall declare a dividend of all such excess, unless 75% of the total amount of claims herein signed shall consent in writing to the use of said excess for the purpose of carrying on and conducting said business of said corporation.

Seventh. It is further agreed that in case of the death or resignation or refusal to act of Clarence A. Knight, one of the trustees herein named, then John Featherstone's Sons shall have the designation of the successor to the said trustee and in case of the death, resignation or refusal to act of Otto C. Butz, trustee, then Leo Ras-sieur, of St. Louis, shall have the designation of the successor to said Otto C. Butz.

Eighth. In case this agreement is not signed by claimants to the amount of three hundred thousand dollars (\$300,000) against said insolvent estate, then this agreement shall be considered as null and void and without effect, and for the purpose of determining said amount and that purpose only, the claim of John Featherstone's Sons shall be considered as \$90,000.00, leaving \$210,000.00 of creditors to sign outside of John Featherstone's Sons.

Ninth. The said trustees shall be entitled to retain from the moneys collected by them out of the assets of said insolvent under this agreement reasonable compensation for their services in carrying out this trust from time to time as they may see fit, and shall have power to employ all such agents or employes as may be neces-

sary to successfully carry out the purpose of this agreement. The purposes of this agreement being to realize from said assets as much money as may be possible, under all the circumstances, for the benefit of the parties hereto, but said trustees shall be liable only for damages resulting from their negligence and not for losses occurring an account of an error of judgment on their part.

Tenth. Nothing herein contained shall be held to release or discharge any collateral or other security any claimant may hold who signs this agreement, but said claimant shall have the right
410 to pursue and realize from said collateral the same as though this agreement had not been made, but the amount so realized from said collateral shall be deducted from the amount of said claimant's interest herein, and any indorser who pays any claim against said insolvent, may become party hereto for such amount so paid.

Eleventh. If the said Leo Rassieur and Jacob W. Skinkle, Frederick Wideman and Joseph Koenigsberg sign this agreement and hereby agree to aid and do aid in collecting said assets which may be purchased from said assignee in a manner satisfactory to said trustees, then in consideration of such agreement of such services and of the sum of one dollar to the undersigned to them in hand paid, the receipt whereof is hereby acknowledged, the undersigned creditors covenant and agree to release and discharge the said Skinkle, Rassieur, Wideman and Koenigsberg from all alleged liability, by reason of any alleged assenting on their part to the creation of indebtedness by said insolvent corporation in excess of its capital stock, and from all alleged liability as stockholders of said insolvent or any claim against them as alleged copartners, but if this agreement is not signed, as provided in the eighth clause, then this clause — be held null and void.

In witness whereof, the parties hereto have hereunto set their hands and seals, together with the amount of their claims, the day and year first above written.

(Signed by creditors to the amount of \$317,380.05.)

EXHIBIT J.

In the County Court of Cook County.

In the Matter of THE CONSOLIDATED ICE MACHINE COMPANY,
Debtor.

Now comes Robert E. Jenkins, assignee of the estate and effects of the said debtor, by Tatham & Webster, his attorneys, and presents to the court his report of the sale of the plant and stock to Knight and Buts, as trustees for certain creditors, pursuant to their bid, which was heretofore accepted by the court, and the said report having been duly considered, it is ordered by the court that the said report and sale be and the same are hereby approved.

It is further ordered by the court that the said assignee be authorized to take the notes of the said trustees, as trustees, each for

the sum of \$23,500, and due, one, on or before 3 months from December 1st, 1891, and one, on or before 8 months from December 1st, 1891, with interest at six (6) per cent. per annum for the
411 deferred payments as proposed in said bid, and to take as security for such notes and deferred payments a chattel mortgage of said trustees upon the entire machinery and plant sold to said trustees, and the said assignee is also to retain possession of the said stock at the expense of said trustees until the second payment shall be made, but to permit the said trustees to sell all or any portion of the said stock from time to time as they may desire, but the proceeds of such sales to be paid over to the said assignee on account of the said second payment.

And it is further ordered that as a final adjustment of matters concerning said sale, that said trustees are entitled to have credit by reason of the sale of property from said stock by said assignee or otherwise to the amount of seven hundred and fifty dollars, and that such credit shall be applied on the second payment to be made by said trustees on account of such purchase; that as to the property in possession of the De La Vergne Refrigerating Company, that if the assignee shall not be able to deliver the same to said trustees, a credit shall be allowed of the value thereof, not to exceed the sum of five hundred dollars.

It is further ordered that said trustees take said property as of December 1, 1891, without rechecking inventory.

Said trustees to pay all rental accruing for premises occupied by said insolvent estate from December 1, 1891, until April 30, 1892, and occupy said premises during said period.

(Entered Dec. 2, 1891.)

EXHIBIT K.

This indenture, made this 30th day of January, A. D. 1892, by and between Clarence A. Knight and Otto C. Butz, as trustees for John Featherstone's Sons, Leo Rassieur and other creditors of the Consolidated Ice Machine Company, of Chicago, under a certain agreement dated October 9th, 1891, said parties first (part) named to be hereafter known as the parties of the first part, and John Featherstone's Sons, a corporation under the laws of the State of Illinois, to be hereafter known as the party of the second part, witnesseth, as follows:

That the said parties of the first part having purchased from the assignee of the Consolidated Ice Machine Company under a certain bill of sale dated the 1st day of December, A. D. 1891, a copy of which is hereunto attached and marked "Exhibit A," certain of the assets of said Consolidated Ice Machine Company consisting of all the machinery, tools, patterns and merchandise located at the factory of the Consolidated Ice Machine Company on Eighteenth
412 street, in the city of Chicago, and including all patterns and drawings, tools and machinery wherever situated, formerly owned by the Consolidated Ice Machine Company, which said bill of sale also includes the good will of the business of said

Consolidated Ice Machine Company, for further particulars of said purchase reference being made to the said bill of sale hereunto attached and the orders of the county court of Cook county concerning said purchase, the said sale having been made by Robert E. Jenkins as assignee of said Consolidated Ice Machine Company under order of court to the said Clarence A. Knight and Otto C. Butz as trustees for the sum of sixty-nine thousand, seven hundred and fifty dollars (\$69,750.00).

And the said John Featherstone's Sons, party of the second part, in consideration of the matters in this agreement set forth, hereby covenant and agree with the party of the first part to take good and proper care and custody of the said machinery, drawings, patterns and merchandise wheresoever situated after they shall have taken possession thereof, at its own expense, which possession they agree to take at once. That it will make every reasonable effort to dispose of said machinery and stock at its own expense and will pay over the proceeds of said sale to said Knight and Butz, trustees, up to the sum of five thousand dollars (\$5,000.00) in cash, on or before March 1st, 1892, as the proceeds of sale of said machinery and stock from the said party of the second part. All moneys received by said party of the second part for the sale of either machinery or merchandise after the said five thousand dollars (\$5,000.00) has been paid to said parties of the first part, shall be equally divided between the said trustees and the said John Featherstone's Sons. Until said additional sale shall reach the sum of sixty-four thousand seven hundred and fifty dollars (\$64,750.00) the amount retained by the said John Featherstone's Sons, party of the second part, shall be treated by the parties of the first part as payment to them on account of dividends to be declared out of the trust fund now held or to be held by said Knight & Butz, trustees as aforesaid; and the said party of the second part shall give said trustees credit, the same as if said trustees had paid over to them the said amount from the trust fund in cancellation of any dividends accruing to it out of said trust funds, the said party of the second part to give to said trustees receipts from time to time as may be demanded, of the amount of such payments.

It is further covenanted and agreed between the parties of the first and second part, that after the five thousand dollars (\$5,000.00) has been paid as hereinbefore set forth, and the sixty-four thousand seven hundred and fifty dollars (\$64,750) has been received
413 from sales of said machinery, and divided and accredited as hereinbefore set forth, then all said property, including machinery, drawings, patterns, merchandise, or any other material, wherever situated, and the good will of the aforesaid plant, thereafter remaining on hand, shall become the absolute and sole property of the said John Featherstone's Sons, and said trustees shall give to John Featherstone's Sons a bill of sale of all the property so remaining, including the good will, of like kind as was received by them from the said assignee, and said party of the second part has the right to dispose of the same at its option as said party of the second part would any property unto it belonging; provided, how

ever, that if the said party of the second part shall pay in cash to said trustees at any time prior to October 8, 1892, the sum of thirty-two thousand three hundred and seventy-five dollars (\$32,375.00), and said sum of five thousand dollars (\$5,000.00) and give receipts for dividends for balance of thirty-two thousand three hundred and seventy-five dollars (\$32,375.00), then the above-mentioned bill of sale shall at once be given.

It being further agreed by said party of the second part in consideration of the agreements herein contained that it will pay to said party of the first part the sum of thirty-seven thousand three hundred and seventy-five dollars (\$37,375.00) in cash, less any amount received from sales of property by said trustees, prior hereto to other parties than said party of the second part, said sum of thirty-seven thousand three hundred and seventy-five dollars (\$37,375.00) to be paid on or before October 8, 1892, five thousand dollars thereof (\$5,000.00) to be paid prior to March 1, 1892, as above recited, unless the time for the payment thereof should be extended by the trustees, and the balance of sixty-nine thousand seven hundred and fifty dollars (\$69,750.00), namely, the sum of thirty-two thousand three hundred and seventy-five dollars (\$32,375.00) to be charged to said John Featherstone's Sons against dividends accrued or to hereafter accrue from time to time out of said trust funds. For all of the said machinery, patterns and drawings, merchandise and good will the parties of the first part shall receive from said John Featherstone's Sons the sum of sixty-nine thousand seven hundred and fifty dollars (\$69,750.00) after said machinery is disposed of and in any event on or before October 8, 1892, as heretofore recited, thirty-two thousand three hundred and seventy-five dollars (\$32,375.00) of said amount to be treated as paid out of the trust-fund dividends of said second party accrued or to accrue and in the hands of the second (part-), and the balance of thirty-seven thousand three hundred and seventy-five dollars (\$37,375.00) to be paid in cash out of the proceeds of sales of said machinery, etc., as hereinbefore set forth, or as
414 heretofore recited in any event on or before October 8, 1892, unless the time should be extended as heretofore stated.

It is agreed by the parties of the first part to pay all premiums for insurance on said property not already paid and in case said property should be destroyed or damaged by fire said insurance shall be paid to said trustees and applied as far as necessary to cancel and satisfy any deficiency there may be in the aforesaid agreement to pay thirty-two thousand three hundred and seventy-five dollars (\$32,375.00) cash as aforesaid, and the balance to be paid over to John Featherstone's Sons. Said parties of the first part further agree that if the insurance can be obtained to place on said plant an additional insurance of thirty thousand dollars (\$30,000.00).

Said parties of the first part are to pay and cause to be cancelled a chattel mortgage now on said property running to R. E. Jenkins, assignee of said Consolidated Ice Machine Company or in case said party of the second part shall be compelled to pay said mortgage then the amount of said payment shall be deducted from the sum to be paid said trustees in cash as aforesaid.

In witness whereof, the parties of the first part have hereunto set their hands and seals the day and year first above written, and the said party of the second part has caused these presents to be signed by its president, attested by its secretary and its corporate seal to be hereto attached the day and year first above written.

CLARENCE A. KNIGHT, [SEAL.]
 OTTO C. BUTZ, *Trustees*. [SEAL.]
 JOHN FEATHERSTONE'S SONS,
 By JOHN FEATHERSTONE, *President*.

Attest: A. J. FEATHERSTONE, *Secretary*. [SEAL.]

And the said defendant requested the court to declare the law governing the same as follows:

I.

On April 16, 1891, the date of the contract upon which these actions are brought, the Consolidated Ice Machine Company, insolvent, had no assets, legal or equitable, which it could convey, and its stockholders deriving their interest as they must through the corporation, had no interest, legal or equitable, in the assets, including good will of the corporation, which was the subject of conveyance. Nothing passed therefore to the defendants, or either of them, through the pretended sale of the date named, except the certificates of stock.

415

II.

The plaintiffs having at the date of the pretended conveyance no present title to the assets of the Consolidated Ice Machine Company, the case was within the well-known rule which makes such a case void.

III.

The assets of the Consolidated Company, insolvent, being in the hands of an assignee under the assignment laws of the State of Illinois and in process of administration, the stock owned by the respective plaintiffs was the only thing intended to be delivered under the contract, and (*as*) the only thing capable of passing by such contract, and (*much*) therefore be deemed the object of the contract.

IV.

The plaintiffs, as stockholders in the Consolidated Ice Machine Company, an insolvent corporation which had made a deed of all its property to an assignee under the insolvent laws of the State of Illinois, could not therefore, and while such assignee was engaged in the administration of the insolvent's estate, by their joint action convey or transfer any interest in the property or assets of the corporation itself, and therefore the contract must be held to have for its real purpose the transfer of the stock in the corporation which alone was capable of being the subject-matter of transfer.

V.

The stock of the Consolidated Company was a part of the consideration for the promise of the De La Vergne Company to pay \$100,000, in its own stock, or in cash, and the consideration being indivisible, and being illegal so far as the stock was concerned, the contract is illegal and void.

VI.

If the contract be considered as a sale of the assets of the Consolidated Ice Machine Company, including its good will, for stock in the De La Vergne Refrigerating Machine Company, and not a sale of stock, then (*is*) was *ultra vires* as to the vendor company.

VII.

The contract was joint and not several, and therefore the actions are improperly brought.

VIII.

The plaintiffs abandoned the contract upon which the action is brought.

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IX.

The contract for the delivery of the stock was an entire contract ; such delivery was a condition precedent to any action on the part of the plaintiffs ; the plaintiffs failed to make a complete delivery ; and therefore this action must fail.

X.

The contract to increase the capital stock of the De La Vergne Refrigerating Machine Company was *ultra vires* and void.

And thereupon the said consolidated cause was by the court taken under advisement and upon the 27th day of February, A. D. 1897, the court did make the following finding of facts :

(Finding of Facts.)

Consolidated Cause.

In the Circuit Court of the United States within and for the Eastern Division of the Eastern District of Missouri.

GERMAN SAVINGS INSTITUTION, Plaintiff, }
vs.

THE DE LA VERGNE REFRIGERATING MACHINE Company and Wm. C. Richardson, Public Administrator of the City of St. Louis, Missouri, and as such in Charge of the Estate of John C. De La Vergne, Deceased, Defendants. }

LEO RASSIEUR }

vs.

SAME DEFENDANTS. }

JACOB W. SKINKLE }

vs.

SAME DEFENDANTS. }

EDWARD MALLINCKRODT }

vs.

SAME DEFENDANTS. }

ANNIE JUNGENSELD }

vs.

SAME DEFENDANTS. }

LEO S. RASSIEUR, Adm'r, etc., }

vs.

SAME DEFENDANTS. }

LEO RASSIEUR, Surviving Trustee, etc., }

vs.

SAME DEFENDANTS. }

FRED WIDMANN }

vs.

SAME DEFENDANTS. }

417 A jury having been duly waived in said cause, the same was submitted to the court on the evidence produced, and the court finds the following facts, that is to say :

I.

The De La Vergne Refrigerating Machine Company is, and was at the time of the commencement of these actions, a corporation organized under the laws of the State of New York governing the organization of manufacturing corporations enacted on the 17th day

of February, 1848, entitled "An act to authorize the formation of corporations for manufacturing, mining, mechanical or chemical purposes," and acts supplemental or amendatory thereof.

II.

That the Consolidated Ice Machine Company was a corporation organized under the laws of the State of Illinois, in the year 1885; that the purpose of such organization, and the business in which the corporation was engaged, was the manufacture of refrigerating machinery; that the total capital stock of said company, as organized, was two hundred thousand dollars (\$200,000), of which one W. B. Bushnell subscribed for fifty thousand dollars (\$50,000) as treasury stock and an additional fifty thousand dollars (\$50,000) in his own right; that no part of the fifty thousand dollars (\$50,000) treasury stock was ever paid for, or sold by him, or issued by the company; that of the fifty thousand dollars (\$50,000) subscribed in his own right, the said Bushnell paid twenty per cent. (20 %), or ten thousand dollars (\$10,000), and his shares were afterwards duly forfeited to the company for non-payment of additional installments of stock of eighty per cent. (80 %), and were held and owned by the company on October 14th, 1890; that the remaining stock of said Consolidated Ice Machine Company, amounting in all to one hundred thousand dollars (\$100,000), was fully paid, and was held by the persons who are plaintiffs in these several actions, and in the proportions set out in their several declarations filed herein, and in the agreement of April 16th, 1891, hereinafter referred to.

III.

That said Consolidated Ice Machine Company became insolvent, and made a general assignment to one Robert E. Jenkins under date of October 14th, 1890; which assignment was duly executed and was made pursuant to the laws of the State of Illinois, and said Jenkins entered into possession of all of the assets of said Consolidated Ice Machine Company of every nature and description, on said date, and which assignment is yet in full force and effect.

418

IV.

That on the 16th day of April, 1891, the defendant corporation, by its president, John C. De La Vergne, and said John C. De La Vergne personally, entered into a contract with the Consolidated Ice Machine Company and the holders of its issued stock, plaintiffs in these actions, which is in words and figures as follows, that is to say:

"This agreement made and entered into this sixteenth (16th) day of April, 1891, by and between the Consolidated Ice Machine Company, a corporation of the city of Chicago, and State of Illinois, party of the first part, Jacob W. Skinkle, Edward Mallinckrodt, Leo Rassieur, Annie Jungenfeld, Frederick Widman, acting in their own right, P. J. Lingensfelder and Leo Rassieur, as executors of the estate of Edmund Jungenfeld, deceased, and as trustees of

Carl Jungensfeld, a minor, and the German Savings Institution, a banking corporation of the State of Missouri, who are the owners of the issued stock of said, The Consolidated Ice Machine Company and control the unissued stock thereof by virtue of such ownership, parties of the second part, the De La Vergne Refrigerating Machine Company, a corporation of the city of New York, in the State of New York, party of the third part, and John C. De La Vergne, of the city of New York, aforesaid, party of the fourth part.

Witnesseth : Whereas the said party of the first part on the fourteenth (14th) day of October, 1890, made an assignment for the benefit of its creditors to R. E. Jenkins, who is now engaged in winding up its affairs, and whereas further the assets of said party of the first part, in the opinion of the said parties of the second part, exceed in value the liabilities thereof, and consist in part of the good will of said party of the first part (which good will has been established by six years of successful manufacture of refrigerating and ice-making machines), together with an expenditure of the earnings from such manufacture, and *whereas the said party of the third part is willing to acquire such right as the said parties of the first and second parts can assign in and to the said assets*, subject to the obligations of the said party of the first part ; and whereas further, under the laws of the State of Illinois, under which the assignment aforesaid has been made, the said party of the first part is not entitled to the possession of its assets in the hands of the assignee aforesaid, until its obligations have been complied with and discharged, or the majority in number and amount of its creditors have signified their willingness to the court having jurisdiction of said assignment, and an order has been obtained therefrom

419 to have the said assets transferred and delivered by said Jenkins to the said party of the first part, or its assigns, and whereas further, the said party of the third part is now incorporated under the laws of the State of New York with a full-paid capital stock of only three hundred and fifty thousand (350,000) dollars, divided into three thousand five hundred (3,500) shares of one hundred (100) dollars each par value and its net assets, in the opinion of the said party of the fourth part are fully worth the sum of one million four hundred thousand (1,400,000) dollars ; and whereas the said party of the third part and its stockholders are now considering a plan of so increasing the stock of said company as will enable said company to have a full-paid capital of two million (2,000,000) dollars, one million four hundred thousand (1,400,000) dollars of which stock is to be issued to its present stockholders, 100,000 to the stockholders of the Consolidated Ice Machine Company under the terms of this agreement, and the remaining five hundred thousand (500,000) dollars of stock to be disposed of in the market at not less than par, and the proceeds of such at par to become part and parcel of the assets of said De La Vergne Refrigerating Machine Company, the said party of the third part, such plan of increasing the stock of said party of the third part to be carried out either by an increase of stock, under the laws of the State of New York, or by the organization of a new company, under

the laws of the State of New Jersey, or some other State, for the purpose of the purchasing of the assets and good will of the party of the third part.

Now, therefore, in view of the premises, and for and in consideration of the mutual advantages to be gained by the execution of this contract:

First. The said party of the first part and the said parties of the second part, agree and covenant to and with the said parties of the third and fourth parts to bargain, sell and convey, **and by these presents do bargain, sell and convey unto the said party of the third part, all their right, title and interest in and to the assets of the said party of the first part,** subject to the payment of its obligations, and subject to the custody thereof in the legal custodian, R. E. Jenkins, assignee, as aforesaid.

Second. The said parties of the third and fourth parts covenant and agree to and with the said parties of the first and second parts to issue unto the said parties of the second part full-paid stock in the said party of the third part to the amount of one hundred thousand dollars (\$100,000.00), and which stock so to be issued shall be issued unto the said parties respectively in the following proportions, to wit:

420 To J. W. Skinkle.....	50
To Edward Mallinckrodt.....	200
	45
	200
To Leo Rassieur.....	40
	200
To Annie Jungenfeld.....	14
	200
To German Savings Institution.....	5
	200
To Frederick Widman.....	14
	200
To P. J. Lingensfelder and Leo Rassieur, as executors as aforesaid	18
	200
To P. J. Lingensfelder and Leo Rassieur, as trustees as aforesaid.....	14
	200

Third. The said parties of the third and fourth parts covenant and agree that the net assets of the said party of the third part are fully worth one million four hundred thousand (1,400,000) dollars, not including the assets and rights purchased under this agreement, and that said stock in the De La Vergne Refrigerating Machine Company, to be issued under this agreement to said parties of the second part, shall represent not less than one-fifteenth ($\frac{1}{15}$ th) part of said assets, and that no additional stock be issued in the said company, or in the new company to be organized as hereinbefore set forth beyond one million five hundred thousand (1,500,000) dollars par value, without actual value in the full amount being first received by said company, and the said parties of the third and fourth parts covenant and agree to and with the said parties of the second part, that said parties of the second part shall have the privilege of examining said assets of the party of the third part until the first day of August, 1891, for the purpose of verifying the statement

made herein concerning the value of said assets, and that if it be ascertained that the actual value of said assets is not in accordance with the covenant hereinbefore set forth, then the said parties of the second part shall have the privilege and right of demanding that said stock so to be issued to them be made to accord with the covenant aforesaid, regarding value, and the said parties of the third and fourth parts covenant and agree to make said stock represent the value aforesaid; and it is further covenanted by and between the parties, that any examination made in good faith by the purchasers of at least one hundred thousand dollars (\$100,000.00) additional stock in said party of the third part, or in the new company to be organized for the purpose of acquiring the assets of said party of the third part, shall be conclusive evidence upon the parties hereto as regards the net value of said assets, providing an opportunity be given to said parties of the second part of being represented and taking part in the making of any such examination.

Fourth. For the purpose of placing the said party of the 421 third part in complete control of the assets of the party of the first part, subject to the legal rights of said assignee, and the creditors of said party of the first part, the said parties of the second part agree within ten (10) days from the date hereof to assign to said party of the fourth part, for the benefit of the said party of the third part, all the stock of the said party of the first part, which has been issued and which they guarantee has been paid in full, and within sixty (60) days thereafter the said parties of the third (part) and fourth parts agree to issue and deliver to said parties of the second part in the proportions aforementioned the stock of the said party of the third part to the amount of one hundred thousand (100,000) dollars.

Fifth. The said parties of the second part covenant and agree to and with said parties of the third and fourth parts to accept in lieu of the said stock in the said party of the third part, or of any successor to the said party of the third part, the sum of one hundred thousand (100,000) dollars in cash, at the option of said party of the fourth part.

Sixth. It is clearly understood by all the parties hereto that the said party of the third part, by the acceptance of the above conveyance, does not make itself liable for any of the obligations and liabilities of the said party of the first part.

Seventh. The said parties of the second part covenant and agree to and with the said parties of the third and fourth parts for a period of ten (10) years from the date hereof not to enter into or become connected with the sale of refrigerating or ice-making machines, directly or indirectly, within the United States of North America, excepting the State of Montana, and excepting also the business of the said party of the third part, or of such company as becomes its successor and purchaser of all its rights.

In witness whereof, the said parties of the second and fourth parts have hereunto set their hands and seals, and the said parties of the

first and third parts have caused their respective presidents to affix their names on the day and date first hereinbefore written.

(Signed) THE CONSOLIDATED ICE MACHINE CO.,

By J. W. SKINKLE, *Pres.* [SEAL.]

(Signed) JACOB W. SKINKLE. [SEAL.]

(Signed) EDWARD MALLINCKRODT. [SEAL.]

(Signed) LEO RASSIEUR. [SEAL.]

(Signed) ANNIE JUNGENSELD, [SEAL.]

By LEO RASSIEUR, *Her Att'y-in-fact.*

(Signed) FRED WIDMAN, [SEAL.]

By LEO RASSIEUR, *His Att'y.*

422 (Signed) P. J. LINGENFELDER AND [SEAL.]

LEO RASSIEUR, [SEAL.]

Executors of the Estate of Ed. Jungenfeld, Deceased.

(Signed) P. J. LINGENFELDER AND

LEO RASSIEUR, [SEAL.]

Trustees of Carl Jungenfeld, Minor.

(Signed) GERMAN SAVINGS INSTITU- [SEAL.]

TION,

By LEO RASSIEUR, *Its Att'y.*

(Signed) THE DE LA VERGNE REFRIGER-

ATING MACHINE CO.,

By JOHN C. DE LA VERGNE, *Pres.* [SEAL.]

JOHN C. DE LA VERGNE. [SEAL.]

I consent to the execution of above contract and ratify the same.

(Signed) J. KOENIGSBERG.

I consent to the execution of above contract and ratify the same.

(Signed) ANNIE JUNGENSELD,

By H. A. HAEUSSLER, *Att'y.*

I consent to the execution of above contract and ratify same.

(Signed) F. WIDMAN.

Herewith I ratify the execution of foregoing agreement by my co-executor and cotrustee, and adopt the same as my act as trustee and executor, and consent to such sale and contract.

P. J. LINGENFELDER,

Executor of E. Jungenfeld's Estate.

P. J. LINGENFELDER,

Trustee for Carl Jungenfeld, a Minor.

The undersigned, German Savings Institution, herewith ratifies the execution of foregoing agreement and sale by Leo Rassieur, its attorney, and consents to said sale.

THE GERMAN SAVINGS INSTITUTION,

By RICHARD HOSPES, *Cashier.*"

V.

Mr. John C. De La Vergne, as president of the De La Vergne Refrigerating Machine Company, through Mr. Waters, attempted

to purchase the claims of the creditors, or a majority of them, at sixty cents (60c.) on the dollar, but was unsuccessful, and abandoned his attempt in the summer of 1891. In the meantime, the county court of Cook county, under whose orders the estate of the Consolidated Ice Machine Company was being administered, did, on the 4th day of May, 1891, enter an order for the sale of the manufacturing plant of said insolvent, including machinery, tools, 423 patterns, drawings and good will, and also all stock on hand at the time of such sale,—said order is in words and figures following, that is to say :

In the County Court of Cook County.

In the Matter of THE CONSOLIDATED ICE MACHINE COMPANY, Insolvent.

It appearing to the court from the petition of Robert E. Jenkins, assignee of the Consolidated Ice Machine Company, an insolvent debtor, that the said petitioner as such assignee, has carried on and prosecuted the business of said company in pursuance of an order heretofore entered by this court, and has completed certain unfinished contracts and expects to be able to finish and complete all such unfinished contracts within the succeeding thirty days from the date of the entry hereof; that upon the completion of said contracts it will, in the opinion of said assignee, be unnecessary to longer continue said business or occupy the premises heretofore occupied by said insolvent; and that it will be for the interests of said insolvent and its creditors and stockholders and all parties in interest, upon the completion of said unfinished contracts, to sell and dispose of the manufacturing plant of said insolvent, including machinery, tools, patterns, drawings, and good will, and also all stock on hand at the time of such sale :

It is therefore ordered and decreed by the court that the said Robert E. Jenkins, as such assignee, be and he is hereby authorized and empowered to advertise and offer for sale for cash the entire manufacturing plant of the said The Consolidated Ice Machine Company, including all machinery, tools, patterns, drawings, and the good will of said company, and also all stock remaining on hand at the time of such sale, to be inventoried and sold with said other property and assets of said insolvent; that said assignee is hereby authorized and empowered to advertise and offer for sale the said property as an entirety, including the present leasehold interest of said premises occupied by said insolvent, which will expire on May 1st, 1893, together with the entire manufacturing plant, machinery, tools, patterns, drawings, and good will, as aforesaid, and to cause an inventory of the stock on hand belonging to said insolvent to be made, and to advertise and receive bids for the said stock on hand so inventoried, and said plant, property and assets, up to twelve o'clock, noon, on Saturday, May 30th, 1891.

It is further ordered that said assignee reserve the right to reject any and all bids that may be so received by him, and that upon the

424 receipt of any bid or bids up to the date aforesaid, the said assignee submit the same to this court with such recommendations with reference to the same as to him shall seem meet and proper and for the interests of said insolvent and its creditors, for such other, further, or final order thereon as to this court shall seem meet and proper.

And it is further ordered that said assignee have leave from time to time to apply to this court for such further or other order in connection with the advertisement and sale of said property as shall be deemed necessary and proper.

(Entered May 4th, 1891.)

VI.

That at the sale under the order of court heretofore referred to, Knight and Butz, as trustees, became the purchasers of all the assets ordered to be sold by the court, including the good will, patterns, etc., of the Consolidated Ice Machine Company, insolvent; which sale was duly confirmed by the court on the 2nd day of December, 1891, pursuant to an order duly entered in said court,—which is in words and figures as follows, that is to say:

In the County Court of Cook County.

In the Matter of THE CONSOLIDATED ICE MACHINE COMPANY, Debtor.

Now comes Robert E. Jenkins, assignee of the estate and effects of the said debtor, by Tatham & Webster, his attorneys, and presents to the court his report of the sale of the plant and stock to Knight and Butz, as trustees for certain creditors, pursuant to their bid, which was heretofore accepted by the court, and the said report having been duly considered, it is ordered by the court that the said report and sale be and the same are hereby approved.

It is further ordered by the court that the said assignee be authorized to take the notes of the said trustees, as trustees, each for the sum of \$23,500, and due, one, on or before 3 months from December 1st, 1891, and one, on or before 8 months from December 1st, 1891, with interest at six (6) per cent. per annum for the deferred payments as proposed in said bid, and to take as security for such notes and deferred payments a chattel mortgage of said trustees upon the entire machinery and plant sold to said trustees, and the said assignee is also to retain possession of the said stock at the expense of said trustees until the second payment shall be made, but to permit the said trustees to sell all or any portion of the said stock from time to time as they may desire, but the proceeds of such sales to be paid over to the said assignee on account of the said second payment.

425 And it is further ordered that as a final adjustment of matters concerning said sale, that said trustees are entitled to have credit by reason of the sale of property from said stock by said assignee or otherwise to the amount of seven hundred and fifty dollars, and that such credit shall be applied on the second payment to be made by said trustees on account of such purchase;

that as to the property in possession of the De La Vergne Refrigerating Company, that if the assignee shall not be able to deliver the same to said trustees, a credit shall be allowed of the value thereof, not to exceed the sum of five hundred dollars.

It is further ordered that said trustees take said property as of December 1, 1891, without rechecking inventory.

Said trustees to pay all rental accruing for premises occupied by said insolvent estate from December 1, 1891, until April 30, 1892, and occupy said premises during said period.

(Entered Dec. 2, 1891.)

VII.

That at the said sale, the De La Vergne Refrigerating Machine Company was a bidder, but offered only the sum of twenty-five thousand dollars (\$25,000).

VIII.

On a former trial of this cause, an agreed statement of facts was entered into, in the words and figures following, to wit:

Agreed Statement of Facts.

"In the above-entitled causes, it is hereby stipulated and agreed, by and between the several plaintiffs to said several causes, and the several defendants therein, that the said causes shall be taken by the court as submitted upon the pleadings and the following statement of facts:

That the defendant, The De La Vergne Refrigerating Machine Company is, and at all the times covered by the pleadings was, a corporation organized under the laws of the State of New York with its chief office in the city of New York in said State, and the defendant John C. De La Vergne is, and at the time when these suits were brought was, a resident of the city of New York in said State. That on the 14th day of October, 1890, the Consolidated Ice Machine Company was a corporation organized under the laws of the State of Illinois and was engaged in the manufacture and sale of refrigerating and ice-making machines. That Exhibit One is the original certificate or papers of its incorporation, and correctly sets forth the subscriptions for stock which were made and reported to

the secretary of state before said certificate of organization
426 was issued. That on said 14th day of October, 1890, said

Consolidated Ice Machine Company made a general assignment for the benefit of its creditors to one R. E. Jenkins, and that at the time of said assignment the capital stock of said Consolidated Ice Machine Company consisted of two thousand shares of the par value of one hundred dollars each, of which said two thousand shares, five hundred subscribed and held by W. B. Bushnell had been forfeited to the company for non-payment of assessments; the five hundred subscribed by W. B. Bushnell as treasury stock had been subscribed by him to sell to workmen in the Consolidated Ice Machine Company, but were never sold or paid for, and that no

certificate had ever been issued for them by said corporation, and that the remaining one thousand shares at said time were fully paid and appeared on the books of the company, and certificates for them were issued, transferred and held as follows:

(1.) Twenty-five shares represented by certificate No. 17 of said Consolidated Ice Machine Company, issued to Leo Rassieur and P. J. Liugenfelder, executors, and appearing in their names upon the books of the company, which certificate had been endorsed by them and thereupon delivered to said German Savings Institution as collateral security.

(2.) Leo Rassieur, 200 shares; represented by certificates Nos. 5, 6, 7 and 8, each for fifty shares, issued to said Leo Rassieur, and appearing in his name upon the books.

Anna, or Annie Jungenfeld, 70 shares; represented by certificate number 12, and appearing in her name upon the books.

Jacob W. Skinkle, 250 shares; these shares appeared in his name upon the books of the company; the certificate for them he had theretofore delivered as collateral security for an indebtedness which he owed to the Merchants' National Bank, and said bank had delivered said certificate to him with power to make the contract hereinafter referred to in his name, said shares being represented by certificate No. 4.

Edward Mallinckrodt, 225 shares; represented by certificate No. 16, and appearing in his name on the books.

Ninety shares appearing on the books of the company in the name of E. Jungenfeld and represented by certificate No. 15; Leo Rassieur and P. J. Lingenfelder were at said time the duly appointed and qualified executors of the estate of E. Jungenfeld, deceased.

Leo Rassieur and P. J. Lingenfelder, trustees of Carl Jungenfeld, 70 shares; represented by certificate No. 13, and appearing in their names upon the books of the company.

427 Frederick Widman, 70 shares; represented by certificate No. 18, and appearing in his name upon the books of the company.

That the assets assigned by said Consolidated Ice Machine Company to said Jenkins consisted in the main of a plant for the manufacture of its machines, located in the city of Chicago, Illinois, of patent rights, outstanding accounts and the good will of its business, in which it had been engaged constantly for about six years. That at said time and for some time prior thereto, the De La Vergne Refrigerating Machine Company was also engaged in the manufacture and sale of refrigerating and ice-making machines, and defendant, John C. De La Vergne, was the principal stockholder and the president thereof.

That on the 16th day of April, 1891, defendants, De La Vergne and The De La Vergne Refrigerating Machine Company and said Consolidated Ice Machine Company, and said several plaintiffs did enter into a contract in writing of which the following is a copy:

"This agreement made and entered into this sixteenth (16th) day of April, 1891, by and between the Consolidated Ice Machine Company, a corporation of the city of Chicago, and State of Illinois,

party of the first part, Jacob W. Skinkle, Edward Mallinckrodt, Leo Rassieur, Annie Jungenfeld, Frederick Widman, acting in their own right, P. J. Lingenfelder and Leo Rassieur, as executors of the estate of Edmund Jungenfeld, deceased, and as trustees of Carl Jungenfeld, a minor, and the German Savings Institution, a banking corporation of the State of Missouri, who are the owners of the issued stock of said, The Consolidated Ice Machine Company, and control the unissued stock thereof by virtue of such ownership, parties of the second part, the De La Vergne Refrigerating Machine Company, a corporation of the city of New York, in the State of New York, party of the third part, and John C. De La Vergne, of the city of New York, aforesaid, party of the fourth part.

Witnesseth: Whereas the said party of the first part on the fourteenth (14th) day of October, 1890, made an assignment for the benefit of its creditors, to R. E. Jenkins, who is now engaged in winding up its affairs, and whereas further the assets of said party of the first part, in the opinion of the said parties of the second part, exceed in value the liabilities thereof, and consist in part of the good will of said party of the first part (which good will has been established by six years of successful manufacture of refrigerating and ice-making machines, together with an expenditure of the
428 earnings from such manufacture), and whereas the said party of the third part is willing to acquire such right as the said parties of the first and second parts can assign in and to the said assets, subject to the obligations of the said party of the first part; and whereas further, under the laws of the State of Illinois, under which the assignment aforesaid has been made, the said party of the first part is not entitled to the possession of its assets in the hands of the assignee aforesaid, until its obligations have been complied with and discharged, or the majority in number, and amount of its creditors have signified their willingness to the court having jurisdiction of said assignment, and an order has been obtained therefrom to have the said assets transferred and delivered by said Jenkins to the said party of the first part, or its assigns, and whereas further, the said party of the third part is now incorporated under the laws of the State of New York with a full-paid capital stock of only three hundred and fifty thousand (350,000) dollars, divided into three thousand five hundred (3,500) shares of one hundred (100) dollars each, par value and its net assets, in the opinion of the said party of the fourth part are fully worth the sum of one million four hundred thousand (1,400,000) dollars; and whereas the said party of the third part and its stockholders are now considering a plan of so increasing the stock of said company as will enable said company to have a full-paid capital of two million (2,000,000) dollars, one million four hundred thousand (1,400,000) dollars of which stock is to be issued to its present stockholders, 100,000 to the stockholders of the Consolidated Ice Machine Company under the terms of this agreement, and the remaining five hundred thousand (500,000) dollars of stock to be disposed of in the market at not less than par, and the proceeds of such at par to become part and parcel of the assets of said De La Vergne Refrigerating Machine Company, the said party of

the third part, such plan of increasing the stock of said party of the third part to be carried out either by an increase of stock, under the laws of the State of New York, or by the organization of a new company, under the laws of the State of New Jersey, or some other State, for the purpose of the purchasing of the assets and good will of the party of the third part.

Now, therefore, in view of the premises, and for and in consideration of the mutual advantages to be gained by the execution of this contract: First. The said party of the first part and the said parties of the second part, agree and covenant to and with the said parties of the third and fourth parts to bargain, sell and convey, and by these presents do bargain, sell and convey unto the said party of the third part, all their right, title and interest in and to the assets of
429 the said party of the first part, subject to the payment of its obligations, and subject to the custody thereof in the legal custodian, R. E. Jenkins, assignee, as aforesaid.

Second. The said parties of the third and fourth parts covenant and agree to and with the said parties of the first and second parts to issue unto the said parties of the second part full-paid stock in the said party of the third part to the amount of one hundred thousand dollars (\$100,000.00), and which stock so to be issued shall be issued unto the said parties respectively in the following proportions, to wit:

To J. W. Skinkle.....	50
" Edward Mallinckrodt.....	200
" Leo Rassieur.....	45
" Annie Jungensfeld.....	200
" German Savings Institution.....	40
" Frederick Widman.....	200
" P. J. Lingenfelder and Leo Rassieur, as executors as aforesaid.....	14
" P. J. Lingenfelder and Leo Rassieur, as trustees as aforesaid.....	200
	14
	200

Third. The said parties of the third and fourth parts covenant and agree that the net assets of the said party of the third part are fully worth one million four hundred thousand (1,400,000) dollars, not including the assets and rights purchased under this agreement, and that said stock in the De La Vergne Refrigerating Machine Company to be issued under this agreement to said parties of the second part shall represent not less than one-fifteenth ($\frac{1}{15}$) part of said assets, and that no additional stock be issued in the said company, or in the new company to be organized as hereinbefore set forth beyond one million five hundred thousand (1,500,000) dollars par value, without actual value in the full amount being first received by said company, and the said parties of the third and fourth parts covenant and agree to and with the said parties of the second part, that said parties of the second part shall have the privilege of examining said assets of the party of the third part until the first day of August, 1891, for the purpose of verifying the state-

ment made herein concerning the value of said assets, and that if it be ascertained that the actual value of said assets is not in accordance with the covenant hereinbefore set forth, then the said parties of the second part shall have the privilege and right of demanding that said stock so to be issued to them be made to accord with the covenant aforesaid, regarding value, and the said parties of the third and fourth parts covenant and agree to make said stock represent the value aforesaid; and it is further covenanted
430 by and between the parties, that any examination made in good faith by the purchasers of at least one hundred thousand dollars (\$100,000.00) additional stock in said party of the third part, or in the new company to be organized for the purpose of acquiring the assets of said party of the third part shall be conclusive evidence upon the parties hereto as regards the net value of said assets, providing an opportunity be given to said party of the second part of being represented and taking part in the making of any such examination

Fourth. For the purpose of placing the said party of the third part in complete control of the assets of the party of the first part, subject to the legal rights of said assignee, and the creditors of said party of the first part, the said parties of the second part agree within ten (10) days from the date hereof to assign to said party of the fourth part for the benefit of the said party of the third part, all the stock of said party of the first part, which has been issued and which they guarantee has been paid in full, and within sixty (60) days thereafter the said parties of the third (part) and fourth parts agree to issue and deliver to said parties of the second part in the proportions aforementioned the stock of the said party of the third part to the amount of one hundred thousand (100,000) dollars.

Fifth. The said parties of the second part covenant and agree to and with said parties of the third and fourth parts to accept in lieu of the said stock in the said party of the third part, or of any successor to the said party of the third part, the sum of one hundred thousand (100,000) dollars in cash, at the option of said party of the fourth part.

Sixth. It is clearly understood by all the parties hereto that the said party of the third part by the acceptance of the above conveyance, does not make itself liable for any of the obligations and liabilities of the said party of the first part.

Seventh. The said parties of the second part covenant and agree to and with the said parties of the third and fourth parts for a period of ten (10) years from the date hereof not to enter into or become connected with the sale of refrigerating or ice-making machines, directly or indirectly within the United States of North America, excepting the State of Montana, and excepting also the business of the said party of the third part, or of such company as becomes its successor and purchaser of all its rights.

431 In witness whereof the said parties of the second and fourth parts have hereunto set their hands and seals, and the said parties of the first and third parts have caused their respective

presidents to affix their names on the day and date first hereinbefore written.

(Signed)	THE CONSOLIDATED ICE MACHINE CO.,	
	By J. W. SKINKLE, <i>Pres.</i>	[SEAL.]
(Signed)	JACOB W. SKINKLE,	[SEAL.]
(Signed)	EDWARD MALLINCKRODT.	[SEAL.]
(Signed)	LEO RASSIEUR.	[SEAL.]
(Signed)	ANNIE JUNGENSELD,	[SEAL.]
	By LEO RASSIEUR, <i>Her Att'y-in-fact.</i>	
(Signed)	FRED WIDMAN,	[SEAL.]
	By LEO RASSIEUR, <i>His Att'y.</i>	
(Signed)	P. J. LINGENFELDER AND	[SEAL.]
	LEO RASSIEUR,	[SEAL.]
	<i>Executors of the Estate of Ed. Jungensfeld, Deceased.</i>	
(Signed)	P. J. LINGENFELDER AND	[SEAL.]
	LEO RASSIEUR,	
	<i>Trustees of Carl Jungensfeld, Minor.</i>	
(Signed)	GERMAN SAVINGS INSTITUTION,	[SEAL.]
	By LEO RASSIEUR, <i>Its Att'y.</i>	
(Signed)	THE DE LA VERGNE REFRIGERATING MACHINE CO.	[SEAL.]
	JOHN C. DE LA VERGNE, <i>Pres.</i>	
	JOHN C. DE LA VERGNE.	[SEAL.]

I consent to the execution of above contract and ratify the same.
(Signed) J. KOENIGSBERG.

I consent to the execution of above contract and ratify the same.
(Signed) ANNA JUNGENSELD,
By H. A. HAEUSSLER, *Att'y.*

I consent to the execution of above contract and ratify same.
(Signed) F. WIDMAN.

Herewith I ratify the execution of foregoing agreement by my co-executor and cotrustee, and adopt the same as my act as trustee and executor, and consent to such sale and contract.

P. J. LINGENFELDER,
Executor of E. Jungensfeld's Estate.
P. J. LINGENFELDER,
Trustee for Carl Jungensfeld, a Minor.

432 The undersigned, German Savings Institution, herewith ratifies the execution of foregoing agreement and sale by Leo Rassieur, its attorney, and consents to said sale.

GERMAN SAVINGS INSTITUTION,
By RICHARD HOSPES, *Cashier.*"

It is further agreed that subsequently, to wit: on the 23d day of April, 1891, Leo Rassieur addressed a letter to Joseph Koenigsberg, a copy of which is as follows:

"APRIL 23D, 1891.

Mr. Joseph Koenigsberg, No. 213 E. 54th street, New York city, N. Y.

DEAR SIR: Enclosed please find certificates of Consolidated I. M. Co., as follows:

No. 17 to Leo Rassieur and P. J. Lingensfelder.....	25 shares.
" 6 " Leo Rassieur	50 "
" 8 " Leo Rassieur	50 "
" 7 " Leo Rassieur	50 "
" 5 " Leo Rassieur	50 "
" 12 " Anna Jungensfeld	70 "
" 4 " Jacob W. Skinkle.....	250 "
" 16 " Edward Mallinckrodt	225 "
" 15 " E. Jungensfeld estate.....	90 "
" 13 " L. R. and P. J. L. for Carl Jungensfeld.....	70 "
" 18 " F. Widman	70 "
	<hr/>
	1,000 "

which please hand on Saturday, April 25th, to Mr. De La Vergne in person, this being the last day.

Yours very truly,

LEO RASSIEUR."

That in this letter were inclosed certificates of stock of the Consolidated Ice Machine Company, with certain indorsements thereon, the originals of which are hereto attached and marked Exhibits 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, and 12.

That the signature to the transfer of certificate No. 4 is that of J. W. Skinkle, plaintiff in case No. 3726; that the signature to transfers of certificates Nos. 5, 6, 7, and 8, is that of Leo Rassieur, plaintiff in case No. 3695; that the signature to transfer of certificate No. 12 is that of Anna Jungensfeld, plaintiff in case No. 3700; that the signatures to transfers of certificate- No. 13, 15 and 17, are the handwriting of Leo Rassieur alone; that the signature to the transfer of said certificate No. 16 is that of Edw. Mallinckrodt, plaintiff in case No. 3698; that the signature to transfer of certificate No. 18 is that of Fred Widman, plaintiff in case No. 3696.

That on the 25th day of April, 1891, said letter from Leo Rassieur to Joseph Koenigsberg of 23d day of April, 1891, together with said enclosures was received by said Koenigsberg; and that 433 on said same 25th day of April, 1891, said Koenigsberg handed all said certificates of stock in the Consolidated Ice Machine Company indorsed as aforesaid, to defendant John C. De La Vergne; and that said John C. De La Vergne thereupon made upon the margin of said letter of the 23d day of April, 1891, the following indorsement:

" 4, 25, '91.

Received the above-described stock from the hand of J. Koenigsberg.

JOHN C. DE LA VERGNE."

That on the 27th day of April, 1891, Ashbell P. Fitch, attorney for defendant John C. De La Vergne, wrote and mailed to Leo Rassieur the following letter:

"APRIL 27TH, 1891.

Leo Rassieur, southwest corner of Fourth and Market Sts., St. Louis, Mo.

DEAR SIR: Mr. De La Vergne has submitted to me the transfer of certificate No. 17 of 25 shares of the Consolidated Ice Machine Company, issued to you and Mr. Lingenfelder as executors of Edmund Jungenfeld's estate, dated September 11th, 1889.

These shares are transferred by the signature of P. J. Lingenfelder and Leo Rassieur, executors of Ed. Jungenfeld, deceased, which of course would be regular. In the body of the assignment, however, are the words 'to John C. De La Vergne by direction of the German Savings Institution, owner hereof.'

It seems to me that the statement that the German Savings Institution is owner of the shares of stock is notice to Mr. De La Vergne of their ownership in such form as would bind him. It seems to me further that if the German Savings Institution are the owners of this certificate, and Mr. De La Vergne has been notified thereof, that the signatures of the executors of the Jungenfeld estate (*is*) insufficient to transfer the certificate to Mr. De La Vergne, unless he holds some ratification of the transfer by the German Savings Institution.

I suppose there would be no difficulty in our getting some memoranda, signed in the proper form by the institution, to the effect that they recognize and approve the transfer of this certificate to Mr. De La Vergne.

There are also several other matters to which I would like to call your attention in this connection.

The signature of the holders of the various certificates to the transfer of the same are not witnessed except in two cases: Mr. Skinkle's certificate No. 4, for 250 shares, is witnessed in lead pencil, and the Anna Jungenfeld certificate, No. 12 for 70 shares, is witnessed by Marguerite Von Jungenfeld.

The stock of the Jungenfeld estate is transferred by P. J. Lingenfelder and yourself, as executors, and I assume that the
434 names of both executors were signed by you, probably under some authority which does not appear on the face of the paper. This is also the case in regard to certificate No. 13 for 70 shares, held by Mr. Lingenfelder and yourself, as trustees for Carl Lingenfelder (*sic*).

There is also a clause printed on the back of this stock in such a way as to be notice to us, which reads as follows:

The holder of any stock, who desires to sell the same or any part thereof, shall be required to tender such stock to the company, and to the stockholders thereof, at par for a period of sixty days, and shall only have the right to sell the same in open market after the company and its stockholders have declined to purchase the same.

I desire to suggest to you that the different questions raised by

the facts which are mentioned above might be covered by some agreement signed by all the stockholders reciting that such a tender had been made to them and to the company, and declined, or that with knowledge of their rights in the premises, the different stockholders had waived this requirement and that this agreement might recite the sale of this stock to Mr. De La Vergne and be signed by Mr. Lingenfelder in his capacity as executor and in his capacity as trustee, and that it might also contain some recital and signature which would cover the question of the witnessing of the different transfers.

These are suggestions as to how this can be covered. Of course you will understand that in one way or another it will be necessary for me to have these points satisfactorily covered. This seems to me to be doubly necessary because it appears on the face of the papers that there is an estate and trust involving minor children, and some of the stock is in the name of a lady, and you know how necessary it is under such circumstances to be careful to get the papers right while the people are all alive and while the transaction is known to us all.

Yours sincerely,
(Signed)

ASHBELL P. FITCH."

Which letter was received by said Leo Rassieur on the 29th day of April, 1891. That on said 29th day of April, 1891, Leo Rassieur replied to said A. P. Fitch in the following letter:

"ST. LOUIS, April 29th, 1891.

A. P. Fitch, Esq., att'y-at-law, 93 Nassau street, New York city, N. Y.

DEAR SIR: In reply to your favor of the 29th inst. which came to hand today, I write to inform you that I shall comply with the request made therein by you.

The fact that all the stockholders have transferred to Mr. De La Vergne under an agreement joined in by the company, 435 seemed to me sufficient to be construed as a waiver of that portion of our by-laws which requires that the stock should first be offered to the company and then to the stockholders thereof, but in order that every question may be fully disposed of to your entire satisfaction, I will have signed such an agreement as you suggest and have it signed by all stockholders, providing you will prepare same and send it on.

Miss Anna Jungenfeld is not in this country and hence such signature as may be required of her will have to be made by her attorney-in-fact, Herman A. Haeussler, Esq.

With a view to covering the two points suggested by you concerning the German Savings Institution stock and that which is held by Dr. Lingenfelder and myself as executors and trustees, I herewith enclose assignments made by them duly witnessed.

Yours very truly,
(Signed)

LEO RASSIEUR.

P. S.—I also enclose my copy of original agreement duly ratified, upon receipt of which please send me Mr. De La Vergne's copy.
L. R."

And that in said letter were enclosed three powers of attorney, all signed by the persons or parties whose names are attached thereto, and in language as follows:

'Know all men by these presents, that we, P. J. Lingenfelder and Leo Rassieur, as executors of the estate of Edmund Jungenfeld, deceased, of the city of St. Louis, State of Missouri, do hereby constitute and appoint — — our true and lawful attorney for us and in our names and behalf to sell, assign and transfer to John C. De La Vergne, Esq., our ninety (90) shares to us belonging in the capital stock of the Consolidated Ice Machine Company, evidenced by certificate No. 15 of said company, and for that purpose to make all necessary acts of assignment and transfer.

In witness whereof, we have hereunto set our hands and seals this twenty-third day of April, 1891.

(Signed)

P. J. LINGENFELDER, [SEAL.]
Executor Ed. Jungenfeld, Deceased.

(Signed)

LEO RASSIEUR, [SEAL.]
Executor Ed. Jungenfeld, Deceased.

Executed in the presence of—

(Signed) HUGO MUENCH.

2. Know all men by these presents, that the German Savings Institution, a banking corporation of the city of St. Louis, State of Missouri, does hereby constitute and appoint Hon. Ashbell P. Fitch its true and lawful attorney for it and in its name and behalf, to sell, assign and transfer unto John C. De La Vergne, Esq., its
436 twenty-five shares (25) to it belonging in the capital stock of the Consolidated Ice Machine Company, evidenced by certificate No. 17 of said company, transferred by P. J. Lingenfelder and Leo Rassieur, executors (in whose name the same appeared on the books), by its directions to said John C. De La Vergne, and for that purpose to make all necessary acts of assignment and transfer.

In witness whereof, the said German Savings Institution has hereunto caused its cashier to affix his hand and its corporate seal this twenty-third day of April, 1891.

(Signed)
[SEAL.]

GERMAN SAVINGS INSTITUTION.
RICHARD HOSPES, *Cashier.*

Executed in presence of—
— —

3. Know all men by these presents, that we, P. J. Lingenfelder and Leo Rassieur, as trustees of Carl Jungenfeld, a minor, under the will of Edm. Jungenfeld, deceased, and with full power of disposition over the assets in our hands, of the city of St. Louis, State of Missouri, do hereby constitute and appoint — — our true

and lawful attorney for us and in our names and behalf to sell, assign and transfer unto John C. De La Vergne, Esq., our seventy (70) shares to us belonging, in the capital stock of the Consolidated Ice Machine Company, evidenced by certificate No. 13 of said company, and for that purpose to make all necessary acts of assignment and transfer.

In witness whereof we have hereunto set our hands and seals this twenty-third day of April, 1891.

(Signed)	P. J. LINGENFELDER, [SEAL.] <i>Trustee Carl Jungensfeld, a Minor.</i>
(Signed)	LEO RASSIEUR, [SEAL.] <i>Trustee Carl Jungensfeld, a Minor."</i>

Executed in presence of—

(Signed) HUGO MUENCH.

But that said powers, though purporting to be executed on the 23d day of April, 1891, were not actually executed until after the 25th day of April, 1891. That in the month of July and later, demand was made by Leo Rassieur on John C. De La Vergne, for the stock provided for in the agreement of April 16th, 1891, and that after said several demands Ashbell P. Fitch, attorney for John C. De La Vergne, wrote and mailed to Leo Rassieur on September 12th, 1891, the following letter:

"SEPTEMBER 12TH, 1891.

LEO RASSIEUR, Esq.

DEAR SIR: I am just out again after a long illness which has prevented my attending to any business for many weeks, and am handed now some letters of yours to Mr. John C. De La Vergne, dated in July and August, in regard to the matters pending between you and others and Mr. De La Vergne, of which I have charge for him.

These letters request the delivery of certain stock of the De La Vergne Company, under a contract made April 16th, 1891, between the Consolidated Ice Machine Company and others, and Mr. De La Vergne.

On examining the contract and correspondence, it seems to me that under that contract you were bound within ten days from the date of the contract to fully and properly assign to Mr. De La Vergne all of the stock of the Consolidated Ice Machine Company which had been issued and it seems to me further that it is clearly shown by my letter of April 27th, 1891, to you and your reply to me dated April 29th, 1891, and by other evidence that this was not done in time in accordance with the contract.

I am also informed that litigation which has during my illness arisen in the State of Illinois in regard to the charter of the Consolidated Company would affect the right of the stockholders or of the company to carry into effect such a contract as that of the 16th of April, 1891, even if the stockholders and the company were not in default under the contract as it seems to be they plainly are.

I am also informed that there is some question in litigation and otherwise affecting the ownership of the stock of the Consolidated Company.

Pending further information on these points, I have still in my possession the papers which you have sent me, and sent to Mr. De La Vergne, which of course, (is) my views as above expressed are correct, I am ready to pass over to whoever is legally entitled to the custody of the same, which is a question which I am not willing personally to decide.

I shall be obliged if you will write to me and explain how far my conclusions above mentioned seem to you to be well founded, and also what from your point of view the present legal status of the Consolidated Company now is.

I am informed that the attorney general of the State of Illinois has taken action which must result in the dissolution of the corporation.

I am not yet able to take up my regular work, and am going to Sharon Springs for a couple of weeks, but any letters sent to my office by you will be forwarded to me.

I regret to learn from your correspondence submitted to me that you have also been ill and hope that you have fully recovered.

Yours sincerely,

(Signed)

ASHBELL P. FITCH."

438 Which letter was received by Leo Rassieur on September 16th, 1891.

It is further agreed that all the stock which Leo Rassieur and P. J. Lingenfelder attempted to transfer, either as trustees or as executors, excepting the 25 shares represented by certificate No. 17, belonged to said E. Jungenfeld at the time of his death and was derived from the estate of Edmund Jungenfeld, deceased, and that said 25 shares represented by said certificate No. 17 was acquired by Leo Rassieur and P. J. Lingenfelder, executors, in payment of a debt owing by Joseph Koenigsberg to said E. Jungenfeld at the time of his death, and that the authority of Leo Rassieur and P. J. Lingenfelder, if they had such authority either as executors of the estate of Edmund Jungenfeld, deceased, or as trustees for Carl Jungenfeld, to sell, exchange or transfer shares of stock in the Consolidated Ice Machine Company, is to be found in the last will and testament of Edmund Jungenfeld, deceased, which is as follows:

"Know all men by these presents, that I, the undersigned Edmund Jungenfeld, being of sound and disposing mind and memory, do make, declare and publish the following as and for my last will and testament, to wit:

Firstly. It is my wish and will that my mother shall act as the guardian of the person and estate of my daughter Anna who is now in her care.

Secondly. It is also my wish and will that my friends Louis P. Wilkins and Leo Rassieur shall be appointed as guardians of the person of my son Carl during his minority.

Thirdly. I desire my estate both real and personal to be divided

into three equal shares or parts, and I give, bequeath and devise one undivided third thereof or one share to my daughter Anna, one share to my friends P. J. Lingensfelder and Leo Rassieur, as trustees of my son Carl, and the remaining share to Sophia Sander, who has for many years faithfully served me and my family and whose services I desire to acknowledge in a substantial manner.

To have and to hold the said respective shares unto the said Anna, my daughter, and to the said Sophia Sander and unto their heirs and assigns forever, and unto the said Lingensfelder and Rassieur as trustees for my son Carl, and unto their assigns and successors in the trust hereby created, under the terms and conditions hereinafter set forth.

The said trustees shall retain control of, manage and invest said trust fund until my said son arrives at the age of twenty-eight (28) years when he shall be entitled to the same. My said trustees shall be required to provide him with the means to continue his
439 education, and also provide him with all necessities; they shall furthermore make him such further allowances and payments as they may deem for his benefit and advantage, having due regard to the use to which the same are to be put and the capacity of my son to take care of such means as may be entrusted to him by my said trustees. My son shall at all times be privileged to require that annual accounts of his estate be rendered him and in default of such accounting, the circuit court of St. Louis city is empowered upon his petition or the petition of any friend to remove my said trustees and appoint one or more trustees in their places.

My said trustees shall have full power to convey, bargain and sell or lease any and all real estate that they possess and hold as part of said trust fund, and also have power to invest any and all funds in their charge as they may deem proper and profitable for their said trust estate.

Fourthly. I hereby nominate and appoint as executors of this will my said friends P. J. Lingensfelder and Leo Rassieur, and also request that no bond be required of them in the discharge of their said duties. I give my executors full power to sell, convey and transfer any part or portion of my estate, if they deem it for the advantage of those interested as legatees. I also authorize and empower them to make any payments that I may owe on stock held by me in any incorporated company, particularly, however, the unpaid portion of my stock in the Consolidated Ice Machine Company of Chicago.

In witness whereof I have hereunto set my hand at St. Louis city this nineteenth day of December, A. D. 1884.

EDMUND JUNGENSELD.

Signed, declared and published as and for his last will and testament by the above-subscribed Edmund Jungensfeld, in our presence, who at his request, in his presence and in the presence of each other, have hereunto subscribed their names as witnesses thereof.

P. J. LINGENSELDER.
MARY JOESEL.
WILHELM LEWITS.
LEO RASSIEUR.

Which said will had been duly probated in the probate court, city of St. Louis, Mo., and under which will said Leo Rassieur and P. J. Lingenfelder duly qualified as executors.

It is further agreed that neither of the plaintiffs mentioned in this agreement ever furnished or offered to furnish defendants, or either of them, certificates of stock in the Consolidated Ice Machine Company issued in the name of John C. De La Vergne; and that
 440 no effort of any kind was ever made to deliver the stock in the Consolidated Ice Machine Company as contemplated in the said agreement of April 16th, 1891, except as hereinabove stated. That no order of court was ever made to authorize Leo Rassieur and P. J. Lingenfelder or either of them, either as executors or as trustees, to make the sale or transfer of stocks contemplated by the said contract of April 16th, 1891. That when Ashbell P. Fitch wrote to Leo Rassieur on the 27th day of April, 1891, and thereafter, and all the times heretofore herein mentioned, said Leo Rassieur was the duly authorized agent and attorney of the parties plaintiff herein.

That the provision printed on the certificates of stock hereto attached as Exhibits 2 to 12 inclusive as part of the by-laws of said Consolidated Ice Machine Company was in fact a part of said by-laws.

It is further agreed that defendants did not within sixty days after the said 25th day of April, 1891, nor did they at any time before or since, issue or deliver to any of the plaintiffs any stock whatever in the defendant company, nor in any other company, nor have they at any time paid any of the plaintiffs any cash money in lieu of stock, although, as is also admitted to be a fact, plaintiffs have demanded of the defendants the one or the other.

It is further agreed that on the 9th day of October, 1891, an agreement was entered into between creditors of the Consolidated Ice Machine Company whose claims amounted to over three hundred thousand dollars, looking to a purchase of a part of the assigned property of said Consolidated Ice Machine Company including its plant and machinery. That of the parties plaintiff herein Fred Widman, J. W. Skinkle, Leo Rassieur and German Savings Institution were at the time creditors of said company, and as such joined in said agreement. That in pursuance of said agreement two trustees named therein did purchase and acquire for said creditors said entire plant and machinery assigned by said Consolidated Ice Machine Company for about seventy thousand dollars and that said trustees thereafter sold said plant and machinery for the benefit of all said creditors named in said agreement for about \$73,000; but that said plant and machinery were never operated by said trustees or by said creditors or any of them.

It is further agreed that either party may read from the Revised Statutes of Illinois, 1891 (Hurd's), or from any other authentic revision or publication, in evidence in these causes such portions of the statutes and laws of the State of Illinois as he deems relevant to the issues, subject to objection for relevancy, and the matter so read shall be treated as if set forth in this agreement of fact."

441 And I find that the facts set forth in the said agreed statement of facts were truly set forth and are as therein stated, except as they are modified and changed by other findings set out herein.

And the court further finds that when the contract involved in this case was entered into, the value of said consolidated company's assets and good will, in the opinion of the defendants, exceeded its liabilities.

And the court further finds that plaintiffs have not, nor have any of them, since entering into said contract abandoned the same, or acquiesced in any abandonment or rescission thereof.

And the court further finds that none of the plaintiffs have since April 16th, 1891, violated the terms or provisions of the covenant of said contract by which they bound themselves not to enter into or become connected with the sale of refrigerating or ice-making machines.

ELMER B. ADAMS, *Judge*.

To the finding of the court that plaintiffs have not, nor have any of them since entering into said contract abandoned the same, or acquiesced in any abandonment or rescission thereof, the said defendants then and there duly excepted.

And to the finding of the court that the plaintiffs have none of them since April 16th, 1891, violated the terms or provisions of the said covenant by which they bound themselves not to enter into or become connected with the sale of refrigerating or ice-making machines, the defendant then and there duly excepted.

And to the failure of the court to find as requested by said defendant in its first proposition of fact that the laws of the State of New York under which the said defendant company was incorporated provided that "it shall not be lawful for such company to use any of their funds in the purchase of any stock in any other corporation," the said defendant then and there duly excepted.

To the failure of the court to find the second proposition of fact requested by said defendant, the said defendant then and there duly excepted.

To the failure of the court to find the third proposition of fact requested by the said defendant, the said defendant then and there duly excepted.

To the failure of the court to find as requested by said defendant the 7th proposition of fact, that said contract was never authorized by the directors and stockholders of the De La Vergne Refrigerating Machine Company, the said defendant then and there duly excepted.

To the failure of the court to find the 8th proposition of fact as requested by the said defendant, said defendant then and there duly excepted.

To the failure of the court to find the 9th proposition of fact as requested by said defendant, said defendant then and there duly excepted.

To the failure of the court to find the 10th proposition of fact re-

quested by the said defendant, said defendant then and there duly excepted.

To the failure of the court to find the 12th proposition of fact as requested by said defendant, said defendant then and there duly excepted.

To the failure of the court to find the 15th proposition of fact requested by the said defendant, said defendant then and there duly excepted.

To the failure of the court to find the 16th proposition of fact requested by the said defendant, the said defendant then and there duly excepted,

To the failure of the court to find the 17th proposition of fact requested by the said defendant, said defendant then and there duly excepted.

And the said court refused to pass upon the propositions of law requested by the said defendant, and refused to pass upon any of the same, upon the ground as indorsed thereon, "Having made a finding of facts, I decline to pass upon abstract questions of law. E. B. A." To which action of the court in so refusing to pass upon the propositions of law requested by said defendant, and in refusing to pass upon any of the same, said defendant then and there duly excepted.

And to the refusal of the court to find and declare the law as requested by the said defendant in the first proposition of law requested by defendant, the said defendant then and there duly excepted.

And to the refusal of the court to find and declare the law as requested by the said defendant in the second proposition of law requested by said defendant, the said defendant then and there duly excepted.

And to the refusal of the court to find and declare the law as requested by the said defendant in the third proposition of law
443 requested by said defendant, said defendant then and there duly excepted.

And to the refusal of the court to find and declare the law as requested by the said defendant in the fourth proposition of law requested by said defendant, the said defendant then and there duly excepted.

And to the refusal of the court to find and declare the law as requested by the said defendant in the fifth proposition of law requested by said defendant, said defendant then and there duly excepted.

And to the refusal of the court to find and declare the law as requested by the said defendant in the sixth proposition of law requested by said defendant, the said defendant then and there duly excepted.

And to the refusal of the court to find and declare the law as requested by the said defendant in the seventh proposition of law requested by said defendant, the said defendant then and there duly excepted.

And to the refusal of the court to find and declare the law as re-

requested by the said defendant in the eighth proposition of law requested by said defendant, the said defendant then and there duly excepted.

And to the refusal of the court to find and declare the law as requested by the said defendant in the ninth proposition of law requested by said defendant, the said defendant then and there duly excepted.

And to the refusal of the court to find and declare the law as requested by the said defendant in the tenth proposition of law requested by said defendant, the said defendant then and there duly excepted.

And thereafter on the said 27th day of February, A. D. 1897, the court rendered judgment in favor of the plaintiffs and against the defendants, for the sum of \$126,849.96 and costs.

To which action of the court in so rendering judgment for the plaintiffs, and against the defendant, De La Vergne Refrigerating Machine Company, said defendant then and there duly excepted and then and there duly and separately excepted to the action of the court in rendering judgment in favor of each of the several plaintiffs and against the defendant.

And thereafter on the 4th day of March, 1897, the said defendant, The De La Vergne Refrigerating Machine Company, filed its motion for a new trial and rehearing of the said cause, in words and figures as follows :

444

(Motion for New Trial.)

In the Circuit Court of the United States within and for the Eastern Division of the Eastern District of Missouri.

GERMAN SAVINGS INSTITUTION, Plaintiff,

vs.

THE DE LA VERGNE REFRIGERATING MACHINE CO. and W. C. Richardson, Public Administrator, Representing the Estate of John C. De La Vergne, Deceased, Defendants.

LEO RASSIEUR

vs.

SAME DEFENDANTS.

JACOB W. SKINKLE

vs.

SAME DEFENDANTS.

EDWARD MALLINCKRODT

vs.

SAME DEFENDANTS.

ANNIE JUNGENSELD

vs.

SAME DEFENDANTS.

LEO S. RASSIEUR, Adm'r, etc.,

vs.

SAME DEFENDANTS. }

P. J. LINGENFELDER

vs.

SAME DEFENDANTS. }

FRED WIDMANN

vs.

SAME DEFENDANTS. }

Consolidated causes.

Comes now the defendant, The De La Vergne Refrigerating Machine Company, and moves the court to set aside the finding and judgment heretofore entered herein, and for a new trial and rehearing of this cause, and as ground of such motion the defendant shows:

1st. That the court erred in overruling the motion of this defendant to dismiss this cause as to Wm. C. Richardson, public administrator, representing the estate of John C. De La Vergne, deceased.

2nd. The court erred in admitting in evidence against the objection of the defendant, the agreed statement of facts made in
445 the case of The German Savings Institution *versus* The De La Vergne Refrigerating Machine Company and Jno. C. De La Vergne, and filed therein in this court on October 3rd, A. D. 1893.

3rd. That the court erred in admitting in evidence, against the objection of the defendant, the appointment and qualification of said Wm. C. Richardson, as public administrator.

4th. That the court erred in admitting in evidence in this case, against the objection of the defendant, the notice of Wm. C. Richardson that he had taken charge of the estate of John C. De La Vergne, as public administrator.

5th. The court erred in excluding evidence offered by the defendant to the effect that the said John C. De La Vergne, deceased, left no property of any kind within the State of Missouri, and that there was not now any property of the said John C. De La Vergne, or of his estate, within the State of Missouri.

6th. The court erred in refusing to find as the facts of this case, the several propositions of fact which the defendant requested it to find, and the court erred as to each of the said several propositions of fact requested by the defendant, in refusing to find the same as requested.

7th. The court erred in refusing to find as the law governing the case, the several propositions of law which the defendant requested it to find, and as to each of the said several propositions the court erred in refusing to hold the same as the law of the case.

8th. The court erred in refusing to pass on the several propositions of law requested by this defendant.

9th. The court erred in refusing to pass on any of the propositions

of law requested by the defendant, and as to each of the said propositions the court erred in refusing to pass on the same.

10th. The court erred in finding as a fact that when the contract involved in this case was entered into the value of the Consolidated Company's assets and good will in the opinion of the defendant exceeded its liabilities, and the said finding of the court was against the weight of evidence in this case.

11th. The court erred in finding that the plaintiffs herein have not, or have any of them since entering the contract sued on, abandoned the same or acquiesced in any abandonment or rescission thereof, and the said finding of the court is against the weight of the evidence herein.

446 12th. The court erred in finding that none of the plaintiffs have since April 16th, 1891, violated the terms or provisions of the said contract by which they bound themselves not to enter into, or become connected with, the sale of refrigerating or ice-making machines, and the said finding of the court is against the weight of the evidence.

13th. The court erred in entering judgment herein for the plaintiffs.

14th. The court erred in entering the judgment herein for any of the plaintiffs hereto.

15th. The judgment as to each and every one of the plaintiffs in whose favor the same was rendered, is against the law.

16th. Said judgment as to each and every one of the plaintiffs in whose favor it was rendered, is against the evidence.

17th. The finding of the court and its judgment herein, should have been in favor of the defendant, The De La Vergne Refrigerating Machine Company.

18th. The court erred in rendering any judgment against Wm. C. Richardson, public administrator, as representing the estate of John C. De La Vergne, deceased.

BOYLE, PRIEST & LEHMANN,

Attorneys for Defendants.

And afterwards, to wit: on the 23rd day of April, 1897, the said court denied and overruled said motion so filed by the said defendant, to which action and ruling of the court, said defendant then and there duly excepted.

And forasmuch as the above and foregoing matters and things do not appear in the record herein, the said defendant, De La Vergne Refrigerating Machine Company, now here in open court presents and tenders to the court this, its bill of exceptions, containing all of the proceedings on the trial of said cause, and prays the court that the same may be allowed, signed, sealed and ordered to be made a part of the record in this cause. All of which is accordingly done this 6th day of May, 1897.

ELMER B. ADAMS, *Judge.*

Indorsed: "No. 3695, 3696, 3697, 3698, 3699, 3700, 3701, 3726. German Savings Institution vs. De La Vergne Refrigerating Ma-

chine Co. and other causes, making up one consolidated (causes). Bill of exceptions. Filed May 10, 1897, as of May 6, 1897. T. L. Crawford, clerk."

447 Said assignment of errors is in words and figures as follows, to wit:

(Assignment of Errors.)

In the Circuit Court of the United States within and for the Eastern Division of the Eastern District of Missouri.

Consolidated cause.

GERMAN SAVINGS INSTITUTION, Plaintiff,

vs.

THE DE LA VERGNE REFRIGERATING MACHINE COMPANY and
Wm. C. Richardson, Public Administrator of the City of St.
Louis, Missouri, and as Such in Charge of the Estate of John C.
De La Vergne, Deceased, Defendants.

LEO RASSIEUR

vs.

SAME DEFENDANTS.

JACOB W. SKINKLE, to the Use of Merchants' National Bank of
Chicago,

vs.

SAME DEFENDANTS.

EDWARD MALLINCKRODT

vs.

SAME DEFENDANTS.

ANNA JUNGENSELD

vs.

SAME DEFENDANTS.

LEO S. RASSIEUR, Administrator *d. b. n., c. t. a.*, of the Estate of
Edmund Jungenseld, Deceased,

vs.

SAME DEFENDANTS.

LEO RASSIEUR, Sole Surviving Trustee of Carl Jungenseld,

vs.

SAME DEFENDANTS.

FRED WIDMAN

vs.

SAME DEFENDANTS.

Comes now the above-named defendant, The De La Vergne Refrigerating Machine Company, by its attorneys of record, and says that in the record — proceedings in said cause, the United States circuit court for the eastern division of the eastern judicial district of

Missouri, committed manifest errors to the injury of said defendant in the following particulars in this, to wit:

448 1. In overruling the motion of this defendant to dismiss this cause as to William C. Richardson, public administrator, in charge of the estate of John C. De La Vergne, deceased; to which action of the court the said defendant then and there duly excepted.

2. And the said court erred in this, to wit: That the plaintiffs in this cause offered in evidence an agreed statement of facts theretofore made between the parties to this suit, and filed in this court on October 3rd, A. D. 1893, which agreed statement of facts is as follows:

Agreed Statement of Facts.

"In the above-entitled causes, it is hereby stipulated and agreed, by and between the several plaintiffs to said several causes, and the several defendants therein, that the said causes shall be taken by the court as submitted upon the pleadings and the (*the*) following statement of facts:

That the defendant, The De La Vergne Refrigerating Machine Company is, and at all the times covered by the pleadings was, a corporation organized under the laws of the State of New York with its chief office in the city of New York in said State, and the defendant John C. De La Vergne is, and at the time when these suits were brought was, a resident of the city of New York in said State. That on the 14th day of October, 1890, the Consolidated Ice Machine Company was a corporation organized under the laws of the State of Illinois and was engaged in the manufacture and sale of refrigerating and ice-making machines. That Exhibit One is the original certificate or papers of its incorporation, and correctly sets forth the subscriptions for stock which were made and reported to the secretary of state before said certificate of organization was issued. That on said 14th day of October, 1890, said Consolidated Ice Machine Company made a general assignment for the benefit of its creditors to one R. E. Jenkins, and that at the time of said assignment the capital stock of said Consolidated Ice Machine Company consisted of two thousand shares of the par value of one hundred dollars each, of which said two thousand shares, five hundred subscribed and held by W. B. Bushnell had been forfeited to the company for non-payment of assessments; the five hundred subscribed by W. B. Bushnell as treasury stock had been subscribed by him to sell to workmen in the Consolidated Ice Machine Company, but were never sold or paid for, and that no certificate had ever been issued for them by said corporation, and that the remaining one thousand shares at said time were fully paid and appeared on the books of the company, and certificates for them were issued, transferred and held as follows:

449 (1.) Twenty-five shares represented by certificate No. 17 of said Consolidated Ice Machine Company, issued to Leo Rasi-sieur and P. J. Lingenfelder, executors, and appearing in their names upon the books of the company, which certificate had been indorsed

by them and thereupon delivered to said German Savings Institution as collateral security.

(2.) Leo Rassieur, 200 shares; represented by certificates Nos. 5, 6, 7 and 8, each for fifty shares, issued to said Leo Rassieur, and appearing in his name upon the books.

Anna, or Annie Jungendorf, 70 shares; represented by certificate number twelve, and appearing in her name upon the books.

Jacob W. Skinkle, 250 shares; these shares appeared in his name upon the books of the company; the certificate for them he had theretofore delivered as collateral security for an indebtedness which he owed to the Merchants' national bank, and said bank had delivered said certificate to him with power to make the contract hereinafter referred to in his name, said shares being represented by certificate No. 4.

Edward Mallinckrodt, 225 shares; represented by certificate No. 16 and appearing in his name upon the books.

Ninety shares appearing on the books of the company in the name of E. Jungendorf and represented by certificate No. 15; Leo Rassieur and P. J. Lingenfelder were at said time the duly appointed and qualified executors of the estate of E. Jungendorf, deceased.

Leo Rassieur and P. J. Lingenfelder, trustees of Carl Jungendorf, 70 shares; represented by certificate No. 13, and appearing in their names upon the books of the company.

Frederick Widman 70 shares; represented by certificate No. 18, and appearing in his name upon the books of the company.

That the assets assigned by said Consolidated Ice Machine Company to said Jenkins consisted in the main of a plant for the manufacture of its machines, located in the city of Chicago, Illinois, of patent rights, outstanding accounts and the good will of its business, in which it had been engaged constantly for about six years. That at said time and for some time prior thereto, the De La Vergne Refrigerating Machine Company was also engaged in the manufacture and sale of refrigerating and ice-making machines, and

450 defendant, John C. De La Vergne, was the principal stockholder and the president thereof.

That on the 16th day of April, 1891, the defendants, De La Vergne and The De La Vergne Refrigerating Machine Company and said Consolidated Ice Machine Company, and said several plaintiffs did enter into a contract in writing of which the following is a copy:

"This agreement made and entered into this sixteenth (16th) day of April, 1891, by and between the Consolidated Ice Machine Company, a corporation of the city of Chicago, and State of Illinois, party of the first part, Jacob W. Skinkle, Edward Mallinckrodt, Leo Rassieur, Annie Jungendorf, Frederick Widman, acting in their own right, P. J. Lingenfelder and Leo Rassieur, as executors of the estate of Edmund Jungendorf, deceased, and as trustees of Carl Jungendorf, a minor, and the German Savings Institution, a banking corporation of the State of Missouri, who are the owners of the issued stock of said, The Consolidated Ice Machine Company, and control the unissued stock thereof by virtue of such ownership, parties of the second part, the De La Vergne Refrigerating Machine

Company, a corporation of the city of New York, in the State of New York, party of the third part, and John C. De La Vergue, of the city of New York, aforesaid, party of the fourth part.

Witnesseth: Whereas the said party of the first part, on the fourteenth (14th) day of October, 1890, made an assignment for the benefit of its creditors to R. E. Jenkins, who is now engaged in winding up its affairs, and whereas further the assets of said party of the first part, in the opinion of the said parties of the second part, exceed in value the liabilities thereof, and consist in part of the good will of said party of the first part (which good will has been established by six years of successful manufacture of refrigerating and ice-making machines, together with an expenditure of the earnings from such manufacture), and whereas the said party of the third part is willing to acquire such right as the said parties of the first and second parts can assign in and to the said assets, subject to the obligations of the said party of the first part; and whereas further, under the laws of the State of Illinois, under which the assignment aforesaid has been made, the said party of the first part is not entitled to the possession of its assets in the hands of the assignee aforesaid, until its obligations have been complied with and discharged, or the majority in number and amount of its creditors have signified their willingness to the court having jurisdiction of

451 said assignment, and an order has been obtained therefrom to have the said assets transferred and delivered by said Jenkins to the said party of the first part, or its assigns, and whereas further, the said party of the third part is now incorporated under the laws of the State of New York with a full-paid capital stock of only three hundred and fifty thousand (350,000) dollars, divided into three thousand five hundred (3,500) shares of one hundred (100) dollars each par value and its net assets, in the opinion of the said party of the fourth part are fully worth the sum of one million four hundred thousand (1,400,000) dollars; and whereas the said party of the third part and its stockholders are now considering a plan of so increasing the stock of said company as will enable said company to have a full-paid capital of two million (2,000,000) dollars, one million four hundred thousand (1,400,000) dollars of which stock is to be issued to its present stockholders, 100,000 to the stockholders of the Consolidated Ice Machine Company under the terms of this agreement, and the remaining five hundred thousand (500,000) dollars of stock to be disposed of in the market at not less than par, and the proceeds of such at par to become part and parcel of the assets of said De La Vergne Refrigerating Machine Company, the said party of the third part, such plan of increasing the stock of said party of the third part to be carried out either by an increase of stock, under the laws of the State of New York, or by the organization of a new company, under the laws of the State of New Jersey, or some other State, for the purpose of the purchasing of the assets and good will of the party of the third part.

Now, therefore, in view of the premises, and for and in considera-

tion of the mutual advantages to be gained by the execution of this contract:

First. The said party of the first part and the said parties of the second part, agree and covenant to and with the said parties of the third and fourth parts to bargain, sell and convey, and by these presents do bargain, sell and convey unto the said party of the third part, all their right, title and interest in and to the assets of the said party of the first part, subject to the payment of its obligations, and subject to the custody thereof in the legal custodian, R. E. Jenkins, assignee, as aforesaid.

Second. The said parties of the third and fourth parts covenant and agree to and with the said parties of the first and second parts to issue unto the said parties of the second part full-paid stock in the said party of the third part to the amount of one hundred thousand dollars (\$100,000.00), and which stock so to be issued shall be issued unto the said parties respectively in the following proportions, to wit:

To J. W. Skinkle.....	50
" Edward Mallinckrodt.....	200
" Leo Rassieur.....	45
" Annie Jungenfeld.....	200
" German Savings Institution.....	40
" Frederick Widman.....	14
" P. J. Lingenfelder and Leo Rassieur, as executors as aforesaid.....	200
" P. J. Lingenfelder and Leo Rassieur, as trustees as aforesaid.....	18
	200
	14
	200

Third. The said parties of the third and fourth parts covenant and agree that the net assets of the said party of the third part are fully worth one million four hundred thousand (1,400,000) dollars, not including the assets and rights purchased under this agreement, and that said stock in the De La Vergne Refrigerating Machine Company, to be issued under this agreement to said parties of the second part, shall represent not less than one-fifteenth ($\frac{1}{15}$ th) part of said assets, and that no additional stock be issued in the said company, or in the new company to be organized as hereinbefore set forth beyond one million five hundred thousand (1,500,000) dollars par value, without actual value in the full amount being first received by said company, and the said parties of the third and fourth parts covenant and agree to and with the said parties of the second part, that said parties of the second part shall have the privilege of examining said assets of the party of the third part until the first day of August, 1891, for the purpose of verifying the statement made herein concerning the value of said assets, and that if it be ascertained that the actual value of said assets is not in accordance with the covenant hereinbefore set forth, then the said parties of the second part shall have the privilege and right of demanding that

said stock so to be issued to them be made to accord with the covenant aforesaid, regarding value, and the said parties of the third and fourth parts covenant and agree to make said stock represent the value aforesaid; and it is further covenanted by and between the parties, that any examination made in good faith by the purchasers of at least one hundred thousand dollars (\$100,000.00) additional stock in said party of the third part, or in the new company to be organized for the purpose of acquiring the assets of said party of the third part, shall be conclusive evidence upon the parties hereto as regards the net value of said assets, providing an opportunity be given to said parties of the second part of being represented and taking part in the making of any such examination.

453 Fourth. For the purpose of placing the said party of the third part in complete control of the assets of the party of the first part, subject to the legal rights of said assignee, and the creditors of said party of the first part, the said parties of the second part agree within ten (10) days from the date hereof to assign to said party of the fourth part for the benefit of the said party of the third part, all the stock of the said party of the first part, which has been issued and which they guarantee has been paid in full, and within sixty (60) days thereafter the said parties of the third (part) and fourth parts agree to issue and deliver to said parties of the second part in the proportions aforementioned the stock of the said party of the third part to the amount of one hundred thousand (100,000) dollars.

Fifth. The said parties of the second part covenant and agree to and with said parties of the third and fourth parts to accept in lieu of the said stock in the said party of the third part, or of any successor to the said party of the third part, the sum of one hundred thousand (100,000) dollars in cash, at the option of said party of the fourth part.

Sixth. It is clearly understood by all the parties hereto that the said party of the third part, by the acceptance of the above conveyance, does not make itself liable for any of the obligations and liabilities of the said party of the first part.

Seventh. The said parties of the second part covenant and agree to and with the said parties of the third and fourth parts for a period of ten (10) years from the date hereof not to enter into or become connected with the sale of refrigerating or ice-making machines, directly or indirectly, within the United States of North America, excepting the State of Montana, and excepting also the business of the said party of the third part, or of such company as becomes its successor and purchaser of all its rights.

In witness whereof the said parties of the second and fourth parts have hereunto set their hands and seals, and the said parties of the

first and third parts have caused their respective presidents to affix their names on the day and date first hereinbefore written.

	(Signed)	THE CONSOLIDATED ICE MACHINE CO.,	[SEAL.]
		By J. W. SKINKLE, <i>Pres.</i>	
	(Signed)	JACOB W. SKINKLE.	[SEAL.]
	(Signed)	EDWARD MALLINCKRODT.	[SEAL.]
	(Signed)	LEO RASSIEUR.	[SEAL.]
	(Signed)	ANNIE JUNGENSELD,	[SEAL.]
		By LEO RASSIEUR, <i>Her Att'y-in-fact.</i>	
454	(Signed)	FRED WIDMAN,	[SEAL.]
		By LEO RASSIEUR, <i>His Att'y.</i>	
	(Signed)	P. J. LINGENFELDER AND	[SEAL.]
		LEO RASSIEUR,	[SEAL.]
		<i>Executors of the Estate of Ed. Jungenfeld, Deceased.</i>	
	(Signed)	P. J. LINGENFELDER AND	
		LEO RASSIEUR,	[SEAL.]
		<i>Trustees of Carl Jungenfeld, Minor.</i>	
	(Signed)	GERMAN SAVINGS INSTI- TUTION,	[SEAL.]
		By LEO RASSIEUR, <i>Its Att'y.</i>	
	(Signed)	THE DE LA VERGNE RE- FRIGERATING MACHINE CO.,	[SEAL.]
		By JOHN C. DE LA VERGNE, <i>Pres.</i>	
		JOHN C. DE LA VERGNE.	[SEAL.]

I consent to the execution of above contract and ratify the same.
(Signed) J. KOENIGSBERG.

I consent to the execution of above contract and ratify the same.
(Signed) ANNA JUNGENSELD,
By H. A. HAEUSSLER, *Att'y.*

I consent to the execution of above contract and ratify same.
(Signed) F. WIDMAN.

Herewith I ratify the execution of foregoing agreement by my co-executor and cotrustee, and adopt the same as my act as trustee and executor and consent to such sale and contract.

P. J. LINGENFELDER,
Executor of E. Jungenfeld's Estate.
P. J. LINGENFELDER,
Trustee for Carl Jungenfeld, a Minor.

The undersigned, German Savings Institution, herewith ratifies the execution of foregoing agreement and sale by Leo Rassieur, its attorney, and consents to said sale.

GERMAN SAVINGS INSTITUTION,
By RICHARD HOSPES, *Cashier.*"

It is further agreed that subsequently, to wit: on the 23d day of April, 1891, Leo. Rassieur addressed a letter to Joseph Koenigsberg, a copy of which is as follows:

455

"APRIL 23D, 1891.

Mr. Joseph Koenigsberg, No. 213 E. 54th street, New York city, N. Y.

DEAR SIR: Enclosed please find certificates of Consolidated I. M. Co., as follows:

No. 17 to Leo Rassieur and P. J. Lingenfelder.....	25 shares.
" 6 " Leo Rassieur	50 "
" 8 " Leo Rassieur	50 "
" 7 " Leo Rassieur	50 "
" 5 " Leo Rassieur	50 "
" 12 " Anna Jungenfeld	70 "
" 4 " Jacob W. Skinkle.....	250 "
" 16 " Edward Mallinckrodt	225 "
" 15 " E. Jungenfeld estate.....	90 "
" 13 " L. R. and P. J. L. for Carl Jungenfeld.....	70 "
" 18 " F. Widman	70 "
	<hr/> 1,000 "

which please hand on Saturday, April 25th. to Mr. De La Vergne in person, this being the last day.

Yours very truly,

LEO RASSIEUR."

That in this letter were inclosed certificates of stock of the Consolidated Ice Machine Company, with certain indorsements thereon, the originals of which are hereto attached and marked Exhibits 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, and 12.

That the signature to the transfer of certificate No. 4 is that of J. W. Skinkle, plaintiff in case No. 3726; that the signature to transfers of certificates Nos. 5, 6, 7, and 8, is that of Leo Rassieur, plaintiff in case No. 3695; that the signature to transfer of certificate No. 12 is that of Anna Jungenfeld, plaintiff in case No. 3700; that the signatures to transfers of certificate- No. 13, 15 and 17, are the handwriting of Leo Rassieur alone; that the signature to the transfer of said certificate No. 16 is that of Edw. Mallinckrodt, plaintiff in case No. 3698; that the signature to transfer of certificate No. 18 is that of Fred Widman, plaintiff in case No. 3696.

That on the 25th day of April, 1891, said letter from Leo Rassieur to Joseph Koenigsberg of 23d day of April, 1891, together with said enclosures was received by said Koenigsberg; and that on said same 25th day of April, 1891, said Koenigsberg handed all said certificates of stock in the Consolidated Ice Machine Company indorsed as aforesaid, to defendant John C. De La Vergne; and that said John C. De La Vergne thereupon made upon the margin of said letter of the 23d day of April, 1891, the following indorsement:

"4, 25, '91.

Received the above-described stock from the hand of J. Koenigsberg.

JOHN C. DE LA VERGNE."

That on the 27th day of April, 1891, Ashbell P. Fitch, attorney for defendant John C. De La Vergne, wrote and mailed to Leo Rassieur the following letter:

"APRIL 27TH, 1891.

Leo Rassieur, southwest corner of Fourth and Market Sts., St. Louis, Mo.

DEAR SIR: Mr. De La Vergne has submitted to me the transfer of certificate No. 17 of 25 shares of the Consolidated Ice Machine Company, issued to you and Mr. Lingenfelder as executors of Edmund Jungenfeld's estate, dated September 11th, 1889.

These shares are transferred by the signature of P. J. Lingenfelder and Leo Rassieur, executors of Ed. Jungenfeld, deceased, which of course would be regular. In the body of the assignment, however, are the words 'to John C. De La Vergne by direction of the German Savings Institution, *owner thereof*.'

It seems to me that the statement that the German Savings Institution is owner of the shares of stock is notice to Mr. De La Vergne of their ownership in such form as would bind him. It seems to me further that if the German Savings Institution are the owners of this certificate, and Mr. De La Vergne has been notified thereof, that the signatures of the executors of the Jungenfeld estate (*is*) insufficient to transfer the certificate to Mr. De La Vergne, unless he holds some ratification of the transfer by the German Savings Institution.

I suppose there would be no difficulty in our getting some memoranda, signed in the proper form by the institution, to the effect that they recognize and approve the transfer of this certificate to Mr. De La Vergne.

There are also several other matters to which I would like to call your attention in this connection.

The signature of the holders of the various certificates to the transfer of the same are not witnessed except in two cases: Mr. Skinkle's certificate No. 4, for 250 shares, is witnessed in lead pencil, and the Anna Jungenfeld certificate, No. 12 for 70 shares, is witnessed by Marguerite Von Jungenfeld.

The stock of the Jungenfeld estate is transferred by P. J. Lingenfelder and yourself, as executors, and I assume that the
457 names of both executors were signed by you, probably under some authority which does not appear on the face of the paper. This is also the case in regard to certificate No. 13 for 70 shares, held by Mr. Lingenfelder and yourself, as trustees for Carl Lingenfelder (*sic*).

There is also a clause printed on the back of this stock in such a way as to be notice to us, which reads as follows:

The holder of any stock, who desires to sell the same or any part

thereof, shall be required to tender such stock to the company, and to the stockholders thereof, at par for a period of sixty days, and shall only have the right to sell the same in open market after the company and its stockholders have declined to purchase the same.

I desire to suggest to you that the different questions raised by the facts which are mentioned above might be covered by some agreement signed by all the stockholders, reciting that such a tender had been made to them and to the company, and declined, or that with knowledge of their rights in the premises, the different stockholders had waived this requirement and that this agreement might recite the sale of this stock to Mr. De La Vergne and be signed by Mr. Lingenfelder in his capacity as executor and in his capacity as trustee, and that it might also contain some recital and signature which would cover the question of the witnessing of the different transfers.

These are suggestions as to how this can be covered. Of course you will understand that in one way or another it will be necessary for me to have these points satisfactorily covered. This seems to me to be doubly necessary because it appears on the face of the papers that there is an estate and trust involving minor children and some of the stock is in the name of a lady, and you know how necessary it is under such circumstances to be careful to get the papers right while the people are all alive and while the transaction is known to us all.

Yours sincerely,

(Signed)

ASHBELL P. FITCH."

Which letter was received by said Leo Rassieur on the 29th day of April, 1891. That on said 29th day of April, 1891, Leo Rassieur replied to said A. P. Fitch in the following letter.

"ST. LOUIS, April 29th, 1891.

A. P. Fitch, Esq., att'y-at-law, 93 Nassau street, New York city, N. Y.

DEAR SIR: In reply to your favor of the 29th inst. which came to hand today, I write to inform you that I shall comply with the request made therein by you.

458 The fact that all the stockholders have transferred to Mr.

De La Vergne under an agreement joined in by the company, seemed to me sufficient to be construed as a waiver of that portion of our by-laws which requires that the stock should first be offered to the company and then to the stockholders thereof, but in order that every question may be fully disposed of to your entire satisfaction, I will have signed such an agreement as you suggest and have it signed by all stockholders, providing you will prepare same and send it on.

Miss Anna Jungensfeld is not in this country and hence such signature as may be required of her will have to be made by her attorney-in-fact, Herman A. Haeussler, Esq.

With a view to covering the two points suggested by you concerning the German Savings Institution stock and that which is

held by Dr. Lingenfelder and myself as executors and trustees, I herewith inclose assignments made by them duly witnessed.

Yours very truly,

(Signed)

LEO RASSIEUR.

P. S.—I also inclose my copy of original agreement duly ratified, upon receipt of which please send me Mr. De La Vergne's copy.

L. R."

And that in said letter were inclosed three powers of attorney all signed by the persons or parties whose names are attached thereto, and in language as follows:

"Know all men by these presents, that we, P. J. Lingenfelder and Leo Rassieur, as executors of the estate of Edmund Jungenfeld, deceased, of the city of St. Louis, State of Missouri, do hereby constitute and appoint ——— our true and lawful attorney for us and in our names and behalf to sell, assign and transfer to John C. De La Vergne, Esq., our ninety '90) shares to us belonging in the capital stock of the Consolidated Ice Machine Company, evidenced by certificate No. 15 of said company, and for that purpose to make all necessary acts of assignment and transfer.

In witness whereof, we have hereunto set our hands and seals this twenty-third day of April, 1891.

(Signed)

P. J. LINGENFELDER, [SEAL.]
Executor Ed. Jungenfeld, Deceased.

(Signed)

LEO RASSIEUR, [SEAL.]
Executor Ed. Jungenfeld, Deceased.

Executed in the presence of—

(Signed) HUGO MUENCH.

2. Know all men by these presents, that the German Savings Institution, a banking corporation of the city of St. Louis, State of Missouri, does hereby constitute and appoint Hon. Ashbell P. Fitch its true and lawful attorney for it and in its name and behalf, to sell, assign and transfer unto John C. De La Vergne, Esq., its twenty-five shares (25) to it belonging in the capital stock of the Consolidated Ice Machine Company, evidenced by certificate No. 17 of said company, transferred by P. J. Lingenfelder and Leo Rassieur, executors (in whose name the same appeared on the books), by its directions to said John C. De La Vergne, and for that purpose to make all necessary acts of assignment and transfer.

In witness whereof the said German Savings Institution has hereunto caused its cashier to affix his hand and its corporate seal this twenty-third day of April, 1891.

(Signed)
[SEAL.]

GERMAN SAVINGS INSTITUTION.
RICHARD HOSPES, *Cashier.*

Executed in presence of—
— — —

3. Know all men by these presents, that we, P. J. Lingenfelder and Leo Rassieur, as trustees of Carl Jungensfeld, a minor, under the will of Edm. Jungensfeld, deceased, and with full power of disposition over the assets in our hands, of the city of St. Louis, State of Missouri, do hereby constitute and appoint — — our true and lawful attorney for us and in our names and behalf to sell, assign and transfer unto John C. De La Vergne, Esq., our seventy (70) shares to us belonging, in the capital stock of the Consolidated Ice Machine Company, evidenced by certificate No. 13, of said company, and for that purpose to make all necessary acts of assignment and transfer.

In witness whereof we have hereunto set our hands and seals this twenty-third day of April, 1891.

(Signed)	P. J. LINGENFELDER, [SEAL.] <i>Trustee Carl Jungensfeld, a Minor.</i>
(Signed)	LEO RASSIEUR, [SEAL.] <i>Trustee Carl Jungensfeld, a Minor."</i>

Executed in presence of—

(Signed) HUGO MUENCH.

But that said powers, though purporting to be executed on the 23d day of April, 1891, were not actually executed until after the 25th day of April, 1891. That in the month of July and later, demand was made by Leo Rassieur on John C. De La Vergne for the stock provided for in the agreement of April 16th, 1891, and that after said several demands Ashbell P. Fitch, attorney for John C. De La Vergne, wrote and mailed to Leo Rassieur on September 12th, 1891, the following letter :

460

" SEPTEMBER 12TH, 1891.

Leo Rassieur, Esq.

DEAR SIR : I am just out again after a long illness which has prevented my attending to any business for many weeks, and am handed now some letters of yours to Mr. John C. De La Vergne, dated in July and August, in regard to the matters pending between you and others and Mr. De La Vergne, of which I have charge for him.

These letters request the delivery of certain stock of the De La Vergne Company under a contract made April 16th, 1891, between the Consolidated Ice Machine Company and others, and Mr. De La Vergne.

On examining the contract and correspondence, it seems to me that under that contract you were bound within ten days from the date of the contract to fully and properly assign to Mr. De La Vergne all of the stock of the Consolidated Ice Machine Company which had been issued and it seems to me further that it is clearly shown by my letter of April 27th, 1891, to you and your reply to me dated April 29th, 1891, and by other evidence that this was not done in time in accordance with the contract.

I am also informed that litigation which has during my illness arisen in the State of Illinois in regard to the charter of the Con-

solidated Company would affect the right of the stockholders or of the company to carry into effect such a contract as that of the 16th of April, 1891, even if the stockholders and the company were not in default under the contract as it seems to (be) they plainly are.

I am also informed that there is some question in litigation and otherwise affecting the ownership of the stock of the Consolidated Company.

Pending further information on these points, I have still in my possession the papers which you have sent me, and sent to Mr. De La Vergne, which of course (is) my views as above expressed are correct, I am ready to pass over to whoever is legally entitled to the custody of the same, which is a question which I am not willing personally to decide.

I shall be obliged if you will write to me and explain how far my conclusions above mentioned seem to you to be well founded, and also what from your point of view the present legal status of the Consolidated Company now is.

I am informed that the attorney general of the State of Illinois has taken action which must result in the dissolution of the corporation.

I am not yet able to take up my regular work, and am going to Sharon Springs for a couple of weeks, but any letters sent to my office by you will be forwarded to me.

461 I regret to learn from your correspondence submitted to me that you have also been ill and hope that you have fully recovered.

Yours sincerely,
(Signed)

ASHBELL P. FITCH."

Which letter was received by Leo Rassieur on September 16th, 1891.

It is further agreed that all the stock which Leo Rassieur and P. J. Lingenfelder attempted to transfer, either as trustees or as executors, excepting the 25 shares represented by certificate No. 17, belonged to said E. Jungenfled at the time of his death and was derived from the estate of Edmund Jungenfled, deceased, and that said 25 shares represented by said certificate No. 17 (was) acquired by Leo Rassieur and P. J. Lingenfelder, executors, in payment of a debt owing by Joseph Koenigsberg to said E. Jungenfled at the time of his death, and that the authority of Leo Rassieur and P. J. Lingenfelder, if they had such authority either as executors of the estate of Edmund Jungenfled, deceased, or as trustees for Carl Jungenfled, to sell, exchange or transfer shares of stock in the Consolidated Ice Machine Company, is to be found in the last will and testament of Edmund Jungenfled, deceased, which is as follows:

"Know all men by these presents, that I, the undersigned Edmund Jungenfled, being of sound and disposing mind and memory, do make, declare and publish the following as and for my last will and testament, to wit:

Firstly. It is my wish and will that my mother shall act as the

guardian of the person and estate of my daughter Anna who is now in her care.

Secondly. It is also my wish and will that my friends Louis P. Wilkins and Leo Rassieur shall be appointed as guardians of the person of my son Carl during his minority.

Thirdly. I desire my estate both real and personal to be divided into three equal shares or parts, and I give, bequeath and devise one undivided third thereof or one share to my daughter Anna, one share to my friends P. J. Lingenfelder and Leo Rassieur, as trustees of my son Carl, and the remaining share to Sophia Sander, who has for many years faithfully served me and my family and whose services I desire to acknowledge in a substantial manner.

To have and to hold the said respective shares unto the said Anna, my daughter, and to the said Sophia Sander and unto their heirs and assigns forever, and unto the said Lingenfelder and Rassieur as trustees for my son Carl, and unto their assigns and
462 successors in the trust hereby created, under the terms and conditions hereinafter set forth.

The said trustees shall retain control of, manage and invest said trust fund until my said son arrives at the age of twenty-eight (28) years when he shall be entitled to the same. My said trustees shall be required to provide him with the means to continue his education, and also provide him with all necessities; they shall furthermore make him such further allowances and payments as they may deem for his benefit and advantage, having due regard to the use to which the same are to be put and the capacity of my son to take care of such means as may be entrusted to him by my said trustees. My son shall at all times be privileged to require that annual accounts of his estate be rendered him and in default of such accounting, the circuit court of St. Louis city is empowered upon his petition or the petition of any friend to remove my said trustees and appoint one or more trustees in their places.

My said trustees shall have full power to convey, bargain and sell or lease any and all real estate that they possess and hold as part of said trust fund, and also have power to invest any and all funds in their charge as they may deem proper and profitable for their said trust estate.

Fourthly. I hereby nominate and appoint as executors of this will my said friends, P. J. Lingenfelder and Leo Rassieur, and also request that no bond be required of them in the discharge of their said duties. I give my executors full power to sell, convey, and transfer any part or portion of my estate, if they deem it for the advantage of those interested as legatees. I also authorize and empower them to make any payments that I may owe on stock held by me in any incorporated company, particularly, however, the unpaid portion of my stock in the Consolidated Ice Machine Company of Chicago.

In witness whereof I have hereunto set my hand at St. Louis city, this nineteenth day of December, A. D. 1884.

EDMUND JUNGENFELD.

Signed, declared and published as and for his last will and testament by the above-subscribed Edmund Jungensfeld, in our presence, who at his request, in his presence and in the presence of each other, have hereunto subscribed their names as witnesses thereof:

P. J. LINGENFELDER.
MARY JOESEL.
WILHELM LEWITS.
LEO RASSIEUR."

Which said will had been duly probated in the probate court, city of St. Louis, Mo., and under which will said Leo Rassieur and P. J. Lingenfelder duly qualified as executors.

463 It is further agreed that neither of the plaintiffs mentioned in this agreement ever furnished or offered to furnish defendants, or either of them, certificates of stock in the Consolidated Ice Machine Company issued in the name of John C. De La Vergne, and that no effort of any kind was ever made to deliver the stock in the Consolidated Ice Machine Company as contemplated in the said agreement of April 16th, 1891, except as hereinabove stated. That no order of court was ever made to authorize Leo Rassieur and P. J. Lingenfelder or either of them, either as executors or as trustees, to make the sale or transfer of stocks contemplated by the said contract of April 16th, 1891. That when Ashbell P. Fitch wrote to Leo Rassieur on the 27th day of April, 1891, and thereafter and all the times herein mentioned, said Leo Rassieur was the duly authorized agent and attorney of the parties plaintiff herein.

That the provision printed on the certificates of stock hereto attached as Exhibits 2 to 12 inclusive as part of the by-laws of said Consolidated Ice Machine Company was in fact a part of said by-laws.

It is further agreed that defendants did not within sixty days after the said 25th day of April, 1891, nor did they at any time before or since, issue or deliver to any of the plaintiffs any stock whatever in the defendant company, nor in any other company, nor have they at any time paid any of the plaintiffs any cash money in lieu of stock, although, as is also admitted to be a fact, plaintiffs have demanded of the defendants the one or the other.

It is further agreed that on the 9th day of October, 1891, an agreement was entered into between creditors of the Consolidated Ice Machine Company whose claims amounted to over three hundred thousand dollars, looking to a purchase of a part of the assigned property of said Consolidated Ice Machine Company including its plant and machinery. That of the parties plaintiff herein Fred Widman, J. W. Skinkle, Leo Rassieur and German Savings Institution were at the time creditors of said company and as such joined in said agreement. That in pursuance of said agreement two trustees named therein did purchase and acquire for said creditors said entire plant and machinery assigned by said Consolidated Ice Machine Company for about seventy thousand dollars, and that said trustees thereafter sold said plant and machinery for the benefit

of all said creditors named in said agreement for about \$73,000; but that said plant and machinery were never operated by said trustees or by said creditors or any of them.

It is further agreed that either party may read from the Revised Statutes of Illinois, 1891 (Hurd's), or from any other
464 authentic revision or publication, in evidence in these causes such portions of the statutes and laws of the State of Illinois as he deems relevant to the issues, subject to objection for relevancy, and the matter so read shall be treated as if set forth in this agreement of fact.

To which offer the defendant, The De La Vergne Refrigerating Machine Co. objected on the grounds that it was not material or competent, and was an agreement entered into with reference to a former trial of the cause, and not binding on the parties at this trial, and also because, in so far as the same includes the contract set out therein, being the contract of April 16th, A. D. 1891, the said contract shows a joint liability while the actions herein were severally brought, and for the further reason that the said contract was never executed by the De La Vergne Refrigerating Machine Co., and because the said contract was, as to the De La Vergne Refrigerating Machine Co., *ultra vires*, and was *ultra vires* as to the Consolidated Ice Machine Co., and was against the public policy of the State of New York and against the public policy of the State of Illinois; which objection was by the court overruled; to which ruling of the court, the defendant, The De La Vergne Refrigerating Machine Co., then and there duly excepted.

3. And the court erred in this: That the plaintiffs offered evidence showing the election and qualification of Wm. C. Richardson as public administrator for the city of St. Louis, Missouri, for the term of four years beginning December 12th, A. D. 1892; to which evidence so offered by the plaintiffs the De La Vergne Refrigerating Machine Co. objected on the grounds that it was immaterial and irrelevant in that the public administrator has no standing as a party in this cause; which objection was, by the court, overruled; to which ruling of the court the defendant's counsel then and there duly excepted.

4. And the said court upon the trial of said cause, committed error in this: That the plaintiffs offered in evidence the notice given by said William C. Richardson as public administrator, on the 13th day of March, A. D. 1896, to the effect that he had taken charge of the estate of John C. De La Vergne, deceased; which notice is in words and figures as follows, to wit:

STATE OF MISSOURI, } ss:
City of St. Louis, }

To the Hon. Leo Rassieur, judge of the probate court of the city of St. Louis:

Notice is hereby given to creditors and all other persons interested in the estate of John C. De La Vergne, late of the city of St.

465 Louis, deceased, that I, the undersigned, public administrator within and for the city aforesaid, have this day taken charge of said estate for the purpose of administering the same.

Given under my hand this 13th day of May, A. D. 1896.

WM. C. RICHARDSON,
Public Administrator.

The above notice bears the following indorsement on the back thereof:

Recorded in Book of Pub. Adm'r Notices on page 418. Filed May 13th, 1896. Jos. A. Wherry, clerk, by J. W. Gutting, D. C.

To which offer the De La Vergne Refrigerating Machine Co. objected on the grounds that the same was immaterial and incompetent, because the public administrator has no standing as a party in this cause, and because the statute assuming to authorize the public administrator to act as such in this cause was unconstitutional; which objection was, by the court, overruled. To which ruling of the court, the defendant, The De La Vergne Refrigerating Machine Co. then and there duly excepted.

4½. And the said court committed error in this: That upon the trial of said cause, it was admitted upon the record by the De La Vergne Refrigerating Machine Company, that, for the purpose of releasing certain attachments made at the time these actions were instituted, John C. De La Vergne, since deceased, deposited with Adolphus Busch, a resident of the city of St. Louis and State of Missouri, certain stocks in the De La Vergne Refrigerating Machine Company belonging to said John C. De La Vergne, and that the said certificates of stock are yet held and retained by said Adolphus Busch, in St. Louis, and, in that connection, the said De La Vergne Refrigerating Machine Company offered to show by Wm. C. Richardson, public administrator, that no property of any kind or description belonging to John C. De La Vergne, deceased, had come into his possession or control; and, that the only property of John C. De La Vergne, deceased, if any, within the State of Missouri at the time of his death, or at the present time, were the certificates referred to; which certificates were indorsed by said John C. De La Vergne, in blank. To which proof so offered by the said defendant, the plaintiffs object; which objection was, by the court, sustained; to which ruling of the court, the said defendant then and there duly excepted.

5. That the court committed error in finding as a fact that the plaintiffs have not, nor have any of them since entering into 466 the contract of April 16th, 1891, abandoned the same or acquiesced in any abandonment or rescission thereof; to which finding of the court, the defendant, The De La Vergne Refrigerating Machine Co. then and there duly excepted.

6. And the said court erred in its finding of fact that the plaintiffs have not, or have any of them, since April 16th, 1891, violated the terms or provisions of their said contract of that date, by which they

bound themselves not to enter into, or become connected with, the sale of refrigerating or ice-making machines; to which finding of the court, the defendant, The De La Vergne Refrigerating Machine Co. then and there duly excepted.

7. And the said court erred in failing to find as requested by the defendant, The De La Vergne Refrigerating Machine Co. in the first proposition of fact requested by it, that the laws of the State of New York under which the defendant, The De La Vergne Refrigerating Machine Co. was incorporated, provide: "That it shall not be lawful for such company to use any of their funds in the purchase of any stock in any other corporation." To which action of the court refusing to so find, the said defendant then and there duly excepted.

8. And the court erred in this: That it failed to find the second proposition of fact requested by said defendant, The De La Vergne Refrigerating Machine Co. as follows:

"That the president and principal stockholder of said corporation, in the years 1890 and 1891, was one John C. De La Vergne, who was made originally a defendant in these actions and was served with process and had appeared herein; that said John C. De La Vergne died testate on May 12th, 1896, in the city of New York, and State of New York, where the executors appointed under his will are engaged in the administration of his estate; that said executors have never appeared in these actions, or any of them, nor has any *scire facias* or other process been issued in said actions, notifying such executors so to appear."

To which action of the court in failing and refusing to so find, the defendant, De La Vergne Refrigerating Machine Co. then and there duly excepted.

9. And the court committed error in this: That it failed to find, as requested by the said defendant, its third proposition of fact, as follows:

"That the said John C. De La Vergne's estate is represented in these actions by W. C. Richardson, who is the duly qualified and acting public administrator under the laws of the State of
467 Missouri, and appears as such representative in these actions solely in his capacity as such public administrator."

To which action of the court in failing and refusing to so find, as requested, the said defendant then and there duly excepted.

10. And the court erred in this: That it failed to find as requested by said defendant in its seventh proposition of fact that the said contract of April 16th, 1891, was never authorized by the directors and stockholders of the De La Vergne Refrigerating Machine Co.; to which failure and refusal of the court to so find, the defendant then and there duly excepted.

11. And the said court erred in this: That it refused to find the ninth proposition of fact requested by said defendant; to which failure and refusal of the court to so find as requested, the said defendant then and there duly excepted.

12. And the said court erred in this: That it refused to find the tenth proposition of fact requested by said defendant; to which

failure and refusal of the court to so find as requested, the said defendant then and there duly excepted.

13. And the said court erred in this: That it refused to find the twelfth proposition of fact requested by said defendant; to which failure and refusal of the court to so find as requested, the said defendant then and there duly excepted.

14. And the said court erred in this: That it refused to find the fifteenth proposition of fact requested by said defendant; to which failure and refusal of the court to so find, as requested, the said defendant then and there duly excepted.

15. And the said court erred in this: That it refused to find the sixteenth proposition of fact requested by said defendant; to which failure and refusal of the court to so find, as requested, the said defendant then and there duly excepted.

16. And the court erred in this: That it refused to find the seventeenth proposition of fact requested by said defendant, as contained in its request for finding of facts, which is as follows:

"That neither John C. De La Vergne nor the De La Vergne Refrigerating Machine Company ever acquired or received any part of the assets of any kind or description of said Consolidated Ice Machine Company, and that the only delivery of any kind or description that was ever made by the parties of the first and second parts to the contract of April 16th, 1891, was of certain shares of stock owned by the several parties of the second part to said contract, and delivered as more particularly described in the next paragraph and the document therein referred to."

The said document being the agreed statement of facts hereinbefore set forth; to which failure and refusal of the court to so find
468 as requested, the said defendant then and there duly excepted.

17. And the said court committed error in this: That it refused to consider or pass upon the ten propositions of law requested by the said defendant, or upon any of the same; to which action of the court in so refusing to pass upon the propositions of law requested by defendant, or upon any of the same, the said defendant then and there duly excepted. The said ten propositions of law are as follows:

" I.

On April 16th, 1891, the date of the contract upon which these actions are brought, the Consolidated Ice Machine Company, insolvent, had no assets, legal or equitable, which it could convey, and its stockholders deriving their interest as they must through the corporation, had no interest, legal or equitable, in the assets, including good will of the corporation, which was the subject of conveyance. Nothing passed therefore to the defendants, or either of them, through the pretended sale of the date named, except the certificates of stock.

II.

The plaintiffs having at the date of the pretended conveyance no present title to the assets of the Consolidated Ice Machine Company,

the case was within the well-known rule which makes such a sale void.

III.

The assets of the Consolidated Company, insolvent, being in the hands of an assignee under the assignment laws of the State of Illinois and in process of administration, the stock owned by the respective plaintiffs was the only thing attempted to be delivered under the contract, and was the only thing capable of passing by such contract, and must therefore be deemed the object of the contract.

IV.

The plaintiffs, as stockholders in the Consolidated Ice Machine Company, an insolvent corporation which had made a deed of all its property to an assignee under the insolvent laws of the State of Illinois, could not thereafter, and while such assignee was engaged in the administration of the insolvent's estate, by their joint action convey or transfer any interest in the property or assets of the corporation itself, and therefore the contract must be held to have for its real purpose the transfer of the stock in the corporation which alone was capable of being the subject-matter of transfer.

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V.

The stock of the Consolidated Company was a part of the consideration for the promise of the De La Vergne Company to pay \$100,000 in its own stock, or in cash, and the consideration being indivisible, and being illegal so far as the stock was concerned, the contract is illegal and void.

VI.

If the contract be considered as a sale of the assets of the Consolidated Ice Machine Company, including its good will, for stock in the De La Vergne Refrigerating Machine Company, and not a sale of stock, then it was *ultra vires* as to the vendor company.

VII.

The contract was joint and not several, and therefore the actions are improperly brought.

VIII.

The plaintiffs abandoned the contract upon which the action is brought.

IX.

The contract for the delivery of the stock was an entire contract; such delivery was a condition precedent to any action on the part of the plaintiffs; the plaintiffs failed to make a complete delivery; and therefore this action must fail.

X.

The contract to increase the capital stock of the De La Vergne Refrigerating Machine Company was *ultra vires* and void."

18. And the said court committed error in this: That it refused to define and declare the law to be, as requested by the said defendant in its first proposition of law, to which refusal of the court, the said defendant then and there duly excepted.

19. And the said court committed error in this: That it refused to define and declare the law to be, as requested by the said defendant in its second proposition of law, to which refusal of the court, the said defendant then and there duly excepted.

20. And the said court committed error in this: That it refused to define and declare the law to be, as requested by the said defendant in its third proposition of law, to which refusal of the court, the said defendant then and there duly excepted.

470 21. And the said court committed error in this: That it refused to define and declare the law to be, as requested by the said defendant in its fourth proposition of law, to which refusal of the court, the said defendant then and there duly excepted.

22. And the said court committed error in this: That it refused to define and declare the law to be, as requested by the said defendant in its fifth proposition of law, to which refusal of the court, the said defendant then and there duly excepted.

23. And the said court committed error in this: That it refused to define and declare the law to be, as requested by the said defendant in its sixth proposition of law, to which refusal of the court, the said defendant then and there duly excepted.

24. And the said court committed error in this: That it refused to define and declare the law to be, as requested by the said defendant in its seventh proposition of law, to which refusal of the court, the said defendant then and there duly excepted.

25. And the said court committed error in this: That it refused to define and declare the law to be, as requested by the said defendant in its eighth proposition of law, to which refusal of the court, the said defendant then and there duly excepted.

26. And the said court committed error in this: That it refused to define and declare the law to be, as requested by the said defendant in its ninth proposition of law, to which refusal of the court, the said defendant then and there duly excepted.

27. And the said court committed error in this: That it refused to define and declare the law to be, as requested by the said defendant in its tenth proposition of law, to which refusal of the court, the said defendant then and there duly excepted.

28. And the said court committed error in entering judgment for the plaintiffs and against the said defendant for the sum of \$126,849.96 and costs.

29. And the said court committed error in entering judgment against said defendant for any sum whatsoever.

30. And the said court committed error in that, upon the facts found by it, it did not enter judgment for the said defendant.

471 31. And the said court committed error in overruling the said defendant's motion for new trial.

32. And the said court committed error in rendering judgment against W. C. Richardson, public administrator, etc.

Wherefore the said defendant, The De La Vergne Refrigerating Machine Company, prays the United States circuit court of appeals for the eighth circuit, that the said judgment of the said circuit court of the United States for the eastern division of the eastern judicial district of Missouri be reversed, and that the said defendant, The De La Vergne Refrigerating Machine Company be restored to all things it has lost by said judgment.

BOYLE, PRIEST & LEHMANN AND
CHARLES H. ALDRICH,
*Attorneys for Defendant The De La Vergne
Refrigerating Machine Company.*

Indorsed: "No. 3695, 3696, 3697, 3698, 3699, 3700, 3701, 3726. German Savings Institution *vs.* De La Vergne Refrigerating Machine Co. and other causes, making up one consolidated cause. Assignment of errors. Filed May 10, 1897, as of May 6, 1897. T. L. Crawford, clerk."

Said petition for writ of error is in words and figures as follows, to wit:

(Petition for Writ of Error.)

In the Circuit Court of the United States within and for the Eastern Division of the Eastern District of Missouri.

Consolidated cause.

GERMAN SAVINGS INSTITUTION, Plaintiff,
vs.

THE DE LA VERGNE REFRIGERATING MACHINE COMPANY and
Wm. C. Richardson, Public Administrator of the City of St.
Louis, Missouri, and as such in Charge of the Estate of John
C. De La Vergne, Deceased, Defendants.

LEO RASSIEUR

vs.

SAME DEFENDANTS.

JACOB W. SKINKLE, to the Use of MERCHANTS' NATIONAL BANK
of Chicago,

vs.

SAME DEFENDANTS.

EDWARD MALLINCKRODT

vs.

SAME DEFENDANTS.

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ANNIE JUNGENSELD

vs.

SAME DEFENDANTS.

LEO S. RASSIEUR, Administrator *d. b. n., c. t. a.*, of the Estate of
Edmund Jungenfeld, Deceased,

vs.

SAME DEFENDANTS.

LEO RASSIEUR, Sole Surviving Trustee of Carl Jungenfeld,

vs.

SAME DEFENDANTS.

FRED WIDMAN

vs.

SAME DEFENDANTS.

Now comes The De La Vergne Refrigerating Machine Co., one of the defendants herein, and says :

That on or about the 27th day of February, 1897, this court entered judgment herein in favor of the plaintiffs and against the defendants, in which judgment, and the proceedings had prior thereto, in this cause, manifest errors were committed to the prejudice of the defendants; all of which will more particularly appear by the assignment of errors which is filed with this petition.

And this defendant, The De La Vergne Refrigerating Machine Co. shows to the court, that it has notified the defendant William C. Richardson, public administrator, and as such in charge of the estate of John C. De La Vergne, deceased, of its purpose to sue out a writ of error in this cause, to the United States circuit court of appeals for the eighth circuit, but that the said Wm. C. Richardson, public administrator, declines to join in the proceedings in error as will appear by the notice to the said Richardson, and his response thereto, on file in this cause.

Wherefore, the defendant, The De La Vergne Refrigerating Machine Company, prays that a writ of error may issue in this behalf to the United States circuit court of appeals for the correction of the errors so complained of, and, that a transcript of the record of the proceedings and papers in this cause, duly authenticated, may be sent to the United States circuit court of appeals.

BOYLE, PRIEST & LEHMANN,

Attorneys for the Defendant Herein and Petitioner for Writ of Error, The De La Vergne Refrigerating Machine Co.

Indorsed : " 3695, 3696, 3697, 3698, 3699, 3700, 3701, 3726.
473 German Savings Institution, pl'ff, *vs.* The De La Vergne Refrigerating Machine Co., *et al.*, def'ts. Consolidated cause. Petition for writ of error. Filed May 10, 1897, as of May 6, 1897. T. L. Crawford, clerk."

Said notification and request to Wm. C. Richardson to join in petition for writ of error, is in words and figures as follows, to wit :

(Notification and Request to Wm. C. Richardson to Join in Petition for Writ of Error.

In the Circuit Court of the United States within and for the Eastern Division of the Eastern District of Missouri.

Consolidated causes.

GERMAN SAVINGS INSTITUTION, Plaintiff,

vs.

THE DE LA VERGNE REFRIGERATING MACHINE COMPANY and
Wm. C. Richardson, Public Administrator, Representing the
Estate of John C. De La Vergne, Deceased, Defendants.

LEO RASSIEUR

vs.

SAME DEFENDANTS.

JACOB W. SKINKLE

vs.

SAME DEFENDANTS.

EDWARD MALLINCKRODT

vs.

SAME DEFENDANTS.

ANNIE JUNGENSELD

vs.

SAME DEFENDANTS.

LEO S. RASSIEUR, Adm'r, etc.,

vs.

SAME DEFENDANTS.

LEO RASSIEUR, (Trustees), etc.,

vs.

SAME DEFENDANTS.

FRED WIDMAN

vs.

SAME DEFENDANTS.

William C. Richardson, public administrator, representing the estate of John C. De La Vergne, deceased.

SIR: You are hereby notified that the defendant, The De
474 La Vergne Refrigerating Machine Company intends to sue
out a writ of error in this case in order to a review of the
same by the circuit court of appeals of the United States, for the
eighth circuit, and you are hereby respectfully requested to join with
it in the proceedings in error.

DE LA VERNE REFRIGERATING
MACHINE COMPANY,
By BOYLE, PRIEST AND LEHMANN,
Its Attorneys.

St. Louis, Mo., May 5th, 1897.

I have rec'd a copy of the foregoing notice and have to reply that I decline to join in the proceedings in error.

WM. C. RICHARDSON,
Public Administrator.

Indorsed: "3695, 3696, 3697, 3698, 3699, 3700, 3701, 3726. Leo Rassieur vs. De La Vergne Refrigerating Machine Company *et al.* Consolidated cause. Notification and request to Wm. C. Richardson to join in petition for writ of error and in proceedings in error. Filed May 10, 1897, as of May 6, 1897. T. L. Crawford, clerk."

And afterwards, to wit: on the 21st day of May, A. D. 1897, the following further proceedings were had and appear of record in said cause, as of May 6, 1897, to wit:

(Supersedeas Bond Approved and Filed.)

Ordered, that the following be entered as of May 6, 1897, *nunc pro tunc*:

3695	Leo Rassieur,	
3696	Frederick Widman,	
3697	German Savings Institution,	
3698	Edward Mallinckrodt,	
3699	Leo Rassieur, Trustee;	
3700	Anna Jungenfeld,	
3701	Edmund Jungenfeld's Adm'r,	
3726	Jacob W. Skinkle, Use, etc., Plaintiffs,	} (Consolidated.)
	<i>vs.</i>	
	De La Vergne Refrigerating Machine	
	Co. <i>et al.</i> , Defendants.	

Now come the plaintiffs and the defendant De La Vergne Refrigerating Machine Company by their respective attorneys and consent and agree that the bond this day presented by the De La Vergne Refrigerating Machine Co. in the penal sum of \$140,000.00 may be approved, thereupon it is ordered that said bond be approved and that a supersedeas be awarded staying further proceedings under the judgments rendered herein.

475 Said supersedeas bond is in words and figures as follows, to wit:

(Supersedeas Bond.)

Know all men by these presents that we, "The De La Vergne Refrigerating Machine Company," of New York city, New York, as principal, and "The City Trust Safe Deposit and Surety Company of Philadelphia," a corporation duly organized under the laws of the State of Pennsylvania and duly qualified under the act of Congress of August 13th, 1894, to become sole surety, and also qualified under the laws of the State of Missouri to transact business therein, and having an office in the city of St. Louis, Mo., as surety, are held and

firmly bound unto Leo Rassieur in the sum of twenty-eight thousand two hundred and thirty-five dollars and forty-five cents (\$28,235.45); unto Frederick Widman in the sum of nine thousand eight hundred and eighty-two dollars and forty cents (\$9,882.40); unto The German Savings Institution in the sum of three thousand five hundred and twenty-nine dollars and forty-three cents (\$3,529.43); unto Edward Mallinckrodt in the sum of thirty-one thousand seven hundred and sixty-four dollars and eighty-eight cents (\$31,764.88); unto Leo Rassieur, sole surviving trustee of Carl Jungenfeld, in the sum of nine thousand eight hundred and eighty-two dollars and forty cents (\$9,882.40); unto Anna Jungenfeld in the sum of nine thousand eight hundred and eighty-two dollars and forty cents (\$9,882.40); unto Leo S. Rassieur, administrator *d. b. n. c. t. a.* of the estate of Edmund Jungenfeld, deceased, in the sum of twelve thousand seven hundred and five dollars and ninety-six cents (\$12,705.96), and unto Jacob W. Skinkle, to the use of Merchants' National Bank of Chicago, in the sum of thirty-four thousand one hundred and seventeen dollars and eight cents (\$34,117.08) (making the aggregate full and just sum one hundred and forty thousand dollars), to be paid in the respective amounts above set forth, to the said Leo Rassieur; Frederick Widman; German Savings Institution; Edmund Mallinckrodt; Leo Rassieur, sole surviving trustee of Carl Jungenfeld; Anna Jungenfeld; Leo S. Rassieur, administrator *d. b. n. c. t. a.* of the estate of Edmund Jungenfeld, deceased, and Jacob W. Skinkle, to the use of Merchants' National Bank of Chicago, their heirs, executors, administrators, successors or assigns, for which payments, well and truly to be made we bind ourselves, our successors and assigns, jointly and severally by the presents.

Sealed with our seals and dated this 12th day of May, A. D. 1897.

476 Whereas, lately, at the September term, A. D. 1896, of the circuit court of the United States, for the eastern division of the eastern judicial district of Missouri, in a consolidated cause depending in said court, in which consolidated cause, Leo Rassieur; Frederick Widman; German Savings Institution; Edward Mallinckrodt; Leo Rassieur, sole surviving trustee of Carl Jungenfeld; Anna Jungenfeld; Leo S. Rassieur, administrator *d. b. n. c. t. a.* of the estate of Edmund Jungenfeld, deceased, and Jacob W. Skinkle, to the use of Merchants National Bank of Chicago, were plaintiffs, and The De La Vergne Refrigerating Machine Company and William C. Richardson, public administrator, in charge of the estate of John C. De La Vergne, deceased, were defendants, judgments were rendered against said The De La Vergne Refrigerating Machine Company on the 27th day of February, for the sum of twenty-five thousand five hundred and eighty-three dollars and thirty-three cents (\$25,583.33) in favor of said Leo Rassieur; for the sum of eight thousand nine hundred and fifty-four dollars and sixteen cents (\$8,954.16) in favor of said Frederick Widman; for the sum of three thousand one hundred and ninety-seven dollars and ninety-one cents (\$3,197.91) in favor of said German Savings Institution; for the sum of twenty-eight thousand seven hundred and eighty-

one dollars and twenty-four cents (\$28,781.24) in favor of said Edward Mallinckrodt; for the sum of eight thousand nine hundred and fifty-four dollars and sixteen cents (\$8,954.16) in favor of said Leo Rassieur as sole surviving trustee of Carl Jungenfled; for the sum of eight thousand nine hundred and fifty four dollars and sixteen cents (\$8,954.16) in favor of Anna Jungenfled; for the sum of eleven thousand five hundred and twelve dollars and fifty cents (\$11,512.50) in favor of said Leo S. Rassieur as administrator *d. b. n. c. t. a.* of the estate of Edmund Jungenfled, deceased, and for the sum of thirty thousand nine hundred and twelve dollars and fifty cents (\$30,912.50) in favor of said Jacob W. Skinkle, to the use of the said Merchants' National Bank of Chicago, making the aggregate sum of one hundred and twenty six thousand eight hundred and forty-nine dollars and ninety-six cents, and their respective costs, and the said defendant, The De La Vergne Refrigerating Machine Company, has obtained a writ of error of the said court to reverse the judgments in the aforesaid consolidated cause, and a citation directed to the said plaintiffs, citing and admonishing them to appear in the circuit court of appeals, for the eighth circuit, at the city of St Louis, sixty days from and after the date of citation:

Now, the condition of the above obligation is such, that if the said "The De La Vergne Refrigerating Machine Company" shall prosecute said writ to effect and answer all damages and
477 costs if it fails to make good its plea, then the above obligation to be void; else, to be in full force and virtue.

Sealed and delivered in presence of—

THE DE LA VERGNE REFRIGERATING
MACHINE CO.,

By JACOB RUPPERT, *Pres't.*

[SEAL.]

JOHN V. RHOADES, *Sec't'y.*

ADOLPH BENDER,

As to the De La Vergne R. M. Co.

THE CITY TRUST, SAFE DEPOSIT AND
SURETY COMPANY OF PHILADELPHIA,

By CHAS. M. SWAIN, *President.*

[SEAL.]

Attest: JAS. F. LYND, *Secretary.*

Approved:

ELMER B. ADAMS, *Judge.*

I, Charles S. Lincoln, clerk of the district court of the United States for the eastern district of Pennsylvania, do hereby certify that the City Trust, Safe Deposit and Surety Company of Philadelphia is a corporation of which I have knowledge, that it is conducting business in the city of Philadelphia and is approved as surety by me in those cases wherein I am authorized to approve it, and that if the foregoing bond executed by it as surety were offered to me for approval I would approve the same.

Dated at Philadelphia, May 12th, 1897.

[SEAL.]

CHARLES S. LINCOLN,

Clerk District Court of the United States

for the Eastern District of Penn.

CITY, COUNTY, AND STATE OF NEW YORK, ss.:

On this 13th day of May, 1897, before me, George E. Mott, a notary public for the State of New York residing in the county of Kings, but whose certificate has been duly filed in the office of the clerk of the city and county of New York, personally appeared Jacob Ruppert, the president of the De La Vergne Refrigerating Machine Company, with whom I am personally acquainted and who, being by me first duly sworn, did depose and say: that he was the president of the De La Vergne Refrigerating Machine Company, one of the corporations described in and which executed the foregoing instrument; that he resided in the city of New York; that he knew the corporate seal of the said The De La Vergne Refrigerating Machine Company; that the seal affixed to the foregoing instrument was such corporate seal; that it was affixed by order of the board of directors of the said The De La Vergne Refrigerating Machine Company and under and by virtue of the by-laws of said The De La Vergne Refrigerating Machine Company, and that he signed said instrument

478 as president of said company by like authority; that the said Jacob Ruppert did further depose and say that he was acquainted with John V. Rhoades and knew him to be the secretary of said The De La Vergne Refrigerating Machine Company; that the signature of John V. Rhoades to the said instrument is in the genuine handwriting of said John V. Rhoades and was thereto subscribed by like authority of the board of directors and in the presence of him, the said Jacob Ruppert, president.

GEO. E. MOTT,

Notary Public, Kings County.

Certificate filed in New York county.

STATE OF NEW YORK, }
City and County of New York, } ss.:

I, Henry D. Purroy, clerk of the city and county of New York, and also clerk of the supreme court for the said city and county, the same being a court of record, do hereby certify that Geo. E. Mott has filed in the clerk's office of the county of New York, a certified copy of his appointment as notary public for the county of Kings with his autograph signature, and was at the time of taking the proof or acknowledgment of the annexed instrument, duly authorized to take the same. And further, that I am well acquainted with the handwriting of such notary, and verily believe the signature to the said certificate of proof or acknowledgment to be genuine.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court and county, the 19 day of May, 1897.

[SEAL.]

HENRY D. PURROY, *Clerk.*

Justification of Surety.

STATE OF PENNSYLVANIA, }
 County of Philadelphia, } ss :

On this twelfth day of May, A. D. 1897, before me, a notary public of the Commonwealth of Pennsylvania, residing in the city of Philadelphia, personally appeared Charles M. Swain, president of the City Trust, Safe Deposit and Surety Company of Philadelphia, elected at a meeting of the board of directors, held May 11th, 1897, with whom I am personally acquainted, who being by me duly sworn, said that he resided in the city of Philadelphia; that he is the president of the said The City Trust, Safe Deposit and Surety Company of Philadelphia; that he knew the corporate seal of the said company; that the seal affixed to the foregoing instrument is such corporate seal; that it was affixed by order of the board of directors of said company, and under and by virtue of the by-
 479 laws of said company; and that he signed said instrument as president of said company, by like authority; and that the liabilities of the said company do not exceed its assets, according to the laws of the State of Pennsylvania, as evidenced by a duly verified copy of a statement of its assets and liabilities, as they were on April 30th, 1897, attached hereto.

And the said Charles M. Swain further said, that he was acquainted with James F. Lynd, and knew him to be the secretary of said company; that the signature of the said James F. Lynd, subscribed to the said instrument, is in the genuine handwriting of the said James F. Lynd, and was thereto subscribed by the like authority of the said board of directors, and in the presence of him, the said Charles M. Swain, president.

And the said Charles M. Swain further said that the attached statement of the assets and liabilities of the said company, is correct and true; and that the said company has not, since the thirtieth day of April, 1897, sustained any losses affecting its financial condition.

[SEAL.]

CHAS. L. LOCKWOOD,

Notary Public.

STATE OF PENNSYLVANIA, }
 County of Philadelphia, } ss :

I, M. Russell Thayer, prothonotary of the county of Philadelphia and clerk of the courts of common pleas, of said county, which are courts of record, having a common seal, being the officer authorized by the laws of the State of Pennsylvania to make the following certificate, do certify, that Chas. L. Lockwood, Esquire, before whom the annexed affidavit was made, was at the time of so doing a notary public for the Commonwealth of Pennsylvania, residing in the county of Philadelphia, duly commissioned and qualified to administer oaths and affirmations and to take acknowledgments and proofs of deeds or conveyances for lands, tenements, and hereditaments in said State of Pennsylvania, and to all whose acts, as such, full faith

and credit are and ought to be given, as well in courts of judicature as elsewhere; and that I am well acquainted with the handwriting of the said notary public, and verily believe his signature thereto is genuine, and that said oath or affirmation purports to be taken in all respects as required by the laws of the State of Pennsylvania.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, this 12th day of May in the year of our Lord, one thousand eight hundred and ninety-seven (1897).

[SEAL.]

M. RUSSELL THAYER, *Prothonotary.*

480 *Statement of the City Trust, Safe Deposit and Surety Company of Philadelphia.*

On the thirtieth day of April, 1897, the assets and liabilities of the company were:

Assets.

Cash on hand.....	\$98,071.25
Cash in banks.....	561,861.61
Call loans upon collaterals.....	631,675.00
Time loans upon collaterals.....	307,370.00
Loans upon bonds and mortgages.....	128,950.00
Investment securities owned, stocks, bonds, &c.....	247,048.10
Real estate, furniture and fixtures.....	508,089.13
Overdrafts.....	74.72
Miscellaneous assets.....	51,040.09

Total..... \$2,534,179.90

Liabilities.

Capital stock.....	\$500,000.00
Surplus fund.....	150,000.00
Undivided profits and reserve.....	178,216.77
Deposits, subject to check.....	1,671,592.32
Deposits, special.....	33,370.81
Miscellaneous liabilities.....	1,000.00

Total..... \$2,534,179.90

COUNTY OF PHILADELPHIA, ss:

James F. Lynd, being duly affirmed, says that he is secretary and treasurer of the City Trust, Safe Deposit and Surety Company of Philadelphia, and that the above is a correct statement of the financial condition of the company on April 30th, 1897.

JAMES F. LYND.

Affirmed to and subscribed before me, this twelfth day of May, A. D. 1897.

[SEAL.]

CHAS. L. LOCKWOOD,
Notary Public.

Indorsed: "3695, 3696, 3697, 3698, 3699, 3700, 3701, 3726. Consolidated. Leo Rassieur vs. The De La Vergne Refrigerating Machine Company. Supersedeas bond. Filed May 21, 1897, as of May 6, 1897. T. L. Crawford, clerk."

UNITED STATES OF AMERICA, }
Eastern Division of the } ss:
Eastern Judicial District of Missouri, }

I, T. L. Crawford, clerk of the circuit court of the United States in and for the eastern division of the eastern judicial district of Missouri, do hereby certify the writing hereto attached to be true transcripts of the record, pleadings and proceedings in the following cases: Case No. 3695, Leo Rassieur vs. The De La Vergne Refrigerating Machine Co. and Wm. C. Richardson, public administrator, &c.; case No. 3696, Frederick Widman vs. Same Defendants; case No. 3697, German Savings Institution vs. Same Defendants; case No. 3698, Edward Mallinckrodt vs. Same Defendants; case No. 3699, Leo Rassieur, trustee, vs. Same Defendants; case No. 3700, Anna Jungenfeld vs. Same Defendants; case No. 3701, Edward Jungenfeld's Administrator vs. Same Defendants; and case No. 3726, Jacob W. Skinkle, to use, &c., vs. Same Defendants, which were consolidated by order of court, of date February 2nd, 1897, as fully as the same remain on file and of record in said case in my office, and that the original writ of error and citation are hereto attached and herewith returned.

Seal of the United States
 Circuit Court, Eastern
 Division of the East-
 ern Judicial District of
 Missouri.

In witness whereof, I hereunto subscribe my name and affix the seal of said court, at office in the city of St. Louis, in the eastern division of said district, this 3rd day of July, in the year of our Lord eighteen hundred and ninety-seven.

T. L. CRAWFORD,
Clerk of said Court.

Filed Jul- 3, 1897.

JOHN D. JORDAN, *Clerk.*

482 And on the sixth day of July, A. D. 1897, an appearance of Mr. Lehmann as counsel for plaintiff in error was filed in the clerk's office of said circuit court of appeals in the words and figures following:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1897.

THE DE LA VERGNE REFRIGERATING MACHINE COM- pany, Plaintiff in Error,	} No. 974.
vs.	
THE GERMAN SAVINGS INSTITUTION ET AL.	

The clerk will enter my appearance as counsel for the plaintiff in error.

F. W. LEHMANN.

(Endorsed :) U. S. circuit court of appeals, eighth circuit, May term, 1897. No. 974. De La Vergne Refrigerating Machine Company, pl'ff in error, *vs.* German Savings Institution *et al.* Appearance. Filed Jul- 6, 1897. John D. Jordan, clerk. F. W. Lehmann, counsel for pl'ff in error.

And on the thirtieth day of August, A. D. 1897, an appearance of counsel for the defendants in error was filed in the clerk's office of said circuit court of appeals in the words and figures following :

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1897.

DE LA VERGNE REFRIGERATING MACHINE COMPANY,	}	No. 974.
Plaintiff in Error,		
<i>vs.</i>		
GERMAN SAVINGS INSTITUTION ET AL.		

The clerk will enter my appearance as counsel for the defendants in error.

B. SCHNURMACHER.

(Endorsed :) U. S. circuit court of appeals, eighth circuit, May term, 1897. No. 974. De La Vergne Refrigerating Machine Co., plaintiff in error, *vs.* German Savings Institution *et al.* Appearance. Filed Aug. 30, 1897. John D. Jordan, clerk. B. Schnurmacher, counsel for deff'ts in error.

483 And on the thirtieth day of December, A. D. 1897, an appearance of Mr. Charles Nagel as counsel for the plaintiff in error was filed in the clerk's office of said circuit court of appeals in the words and figures following, to wit :

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1897.

THE DE LA VERGNE REFRIGERATING MACHINE COM-	}	No. 974.
pany, Plaintiff in Error,		
<i>vs.</i>		
THE GERMAN SAVINGS INSTITUTION ET AL.		

The clerk will enter my appearance as counsel for the plaintiff in error.

CHAS. NAGEL.

(Endorsed :) U. S. circuit court of appeals, eighth circuit, December term, 1897. No. 974. The De La Vergne Refrigerating Machine Co., pl'ff in error, *vs.* The German Savings Institution. Appearance. Filed Dec. 30, 1897. John D. Jordan, clerk. Charles Nagel, counsel for pl'ff in error.

And on the fourth day of January, A. D. 1898, an appearance of Mr. Charles H. Aldrich as counsel for the plaintiff in error was filed in the clerk's office of said circuit court of appeals in the words and figures following :

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1897.

THE DE LA VERGNE REFRIGERATING MACHINE CO., Plaintiff in Error, vs. THE GERMAN SAVINGS INSTITUTION ET AL.	}	No. 974.
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The clerk will enter my appearance as counsel for the plaintiff in error.

CHARLES H. ALDRICH.

(Endorsed :) U. S. circuit court of appeals, eighth circuit, December term, 1897. No. 974. The De La Vergne Refrigerating Machine Co., plaintiff in error, vs. The German Savings Institution et al. Appearance. Filed Jan. 4, 1898. John D. Jordan, clerk. Charles H. Aldrich, counsel for pl'tf in error.

484 And on the fourth day of January, A. D. 1898, in the record of the proceedings of said circuit court of appeals is an entry in said cause in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1897.

TUESDAY, January 4, 1898.

THE DE LA VERGNE REFRIGERATING MACHINE COMPANY, Plaintiff in Error, vs. THE GERMAN SAVINGS INSTITUTION ET AL., Defendants in Error.	}	No. 974.
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In error to the circuit court of the United States for the eastern district of Missouri.

This cause having been called for hearing in its regular order, and Judge Philips, being disqualified, retired and took no part in the hearing of this cause. Thereupon argument was commenced by Mr. Charles H. Aldrich in behalf of the plaintiff in error, but, not being concluded at the hour of adjournment, the further hearing of this cause was postponed until tomorrow morning.

And on the fifth day of January, A. D. 1898, in the record of the proceedings of said circuit court of appeals is an order of submission of said cause in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1897.

WEDNESDAY, January 5, 1898.

THE DE LA VERGNE REFRIGERATING MACHINE COM- pany, Plaintiff in Error,	} No. 974.
vs.	
THE GERMAN SAVINGS INSTITUTION ET AL., Defendants in Error.	

In error to the circuit court of the United States for the eastern district of Missouri.

This cause having been called this day for further hearing, argument was continued by Mr. Charles H. Aldrich in behalf of the plaintiff in error and by Mr. B. Schnurmacher for the defendants in error and concluded by Mr. F. W. Lehmann for the plaintiff in error.

Thereupon the cause was submitted to Judges Sanborn and
485 Thayer upon the transcript of record from said circuit court and the briefs of counsel filed herein. Philips, J., took no part in the hearing of this cause.

And on the thirty-first day of January, A. D. 1898, an opinion of said United States circuit court of appeals was filed in said cause in the following words, to wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, A. D. 1897.

THE DE LA VERGNE REFRIGERATING MACHINE COM- pany, Plaintiff in Error,	} No. 974.
vs.	
GERMAN SAVINGS INSTITUTION ET AL., Defendants in Error.	

In error to the circuit court of the United States for the eastern district of Missouri.

Mr. Charles H. Aldrich and Mr. Frederick W. Lehmann (Mr. W. F. Boyle and Mr. H. S. Priest were with them on the brief) for plaintiff in error.

Mr. B. Schnurmacher (Mr. Leo Rassieur was with him on the brief) for defendants in error.

Before Sanborn and Thayer, circuit judges.

Per Curiam:

The judges are divided in opinion upon the question whether or not the contract which is the basis of this action was *ultra vires* the De La Vergne Refrigerating Machine Company, and are of opinion that the other questions presented should be determined in favor of

the defendants in error. The judgment below is therefore affirmed by a divided court.

Filed January 31, 1898.

And on the thirty-first day of January, A. D. 1898, in the record of the proceedings of said circuit court of appeals is a judgment in said cause in the words and figures following, to wit :

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1897.

MONDAY, January 31, 1898.

<p>486 THE DE LA VERGNE REFRIGERATING MACHINE Company, Plaintiff in Error,</p>	<p>vs.</p>	<p>GERMAN SAVINGS INSTITUTION, LEO RASSIEUR, JACOB W. Shinkle, to the Use of Merchants' National Bank of Chicago; Edward Mallinckrodt, Anna Jungenfeld, Leo S. Rassieur, Adm'r <i>d. b. n. c. t. a.</i> of the Estate of Edmund Jungenfeld, Deceased; Leo Rassieur, Sole Surviving Trustee of Carl Jungenfeld, and Fred Wid- man, Defendants in Error.</p>	}	<p>No. 974.</p>
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In error to the circuit court of the United States for the eastern district of Missouri.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the eastern district of Missouri and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said circuit court in this cause be, and the same is hereby, affirmed by a divided court with costs, and that the German Savings Institution, Leo Rassieur, Jacob W. Shinkle, to the use of Merchants' National Bank of Chicago; Edward Mallinckrodt, Anna Jungenfeld, Leo S. Rassieur, adm'r *d. b. n. c. t. a.* of the estate of Edmund Jungenfeld, deceased; Leo Rassieur, sole surviving trustee of Carl Jungenfeld, and Fred Widman have and recover against the De La Vergne Refrigerating Machine Company the sum of twenty dollars for their costs herein and have execution therefor.

January 31, 1898.

487 United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, clerk of the United States circuit court of appeals for the eighth circuit, do hereby certify that the foregoing four hundred and eighty-six pages contain a true copy of such portions of the transcript of record from said circuit court as were printed pursuant to the stipulation of the parties and used on the hearing of said cause in this court, and full, true, and complete copies of all the proceedings and record entries, including the opinion

of said circuit court of appeals, in the case of The De La Vergne Refrigerating Machine Company, plaintiff in error, *vs.* The German Savings Institution *et al.*, defendants in error, No. 974, December term, 1897, as the same remain on file and of record in my office.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals, at the city of St. Louis, Missouri, this second day of February, A. D. 1898.

JOHN D. JORDAN,

Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

488 UNITED STATES OF AMERICA, 38 :

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the eighth circuit, Greeting :

Being informed that there is now pending before you a suit in which The De La Vergne Refrigerating Machine Company is plaintiff in error and German Savings Institution *et al.* are defendants in error, which suit was removed into the said circuit court of appeals by virtue of a writ of error to the circuit court of the United States for the eastern district of Missouri, and we being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and

489 removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the first day of March, in the year of our Lord one thousand eight hundred and ninety-eight.

JAMES H. MCKENNEY,

Clerk of the Supreme Court of the United States.

Return to Writ of Certiorari.

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, clerk of the United States circuit court of appeals for the eighth circuit, in obedience to the command of the within writ and in pursuance of the stipulation of the parties, a true copy of the original of which is hereto attached, do hereby certify that the transcript of record furnished with the application for a writ of certiorari to the Supreme Court of the United States in the within-named cause contains a full, true, and complete transcript of the record and all things concerning the same as full, true, and complete as the originals of the same now remain on file and of record in my office.

Seal United States Circuit Court of Appeals,
Eighth Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of St. Louis, Missouri, this fifteenth day of March, A. D. 1898.

JOHN D. JORDAN,

Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

490 [Endorsed:] Supreme Court of the United States. No. 579, October term, 1897. The De La Vergne Refrigerating Co. *vs.* The German Savings Institution *et al.* Writ of certiorari. Filed Mar. 11, 1898. John D. Jordan, clerk.

491 In the United States Circuit Court of Appeals, Eighth Circuit.

THE DE LA VERGNE REFRIGERATING MACHINE Co., Plaintiff in Error,
vs.
THE GERMAN SAVINGS INSTITUTION ET AL., Defendants in Error.

It is hereby stipulated and agreed by and between the above-named parties that the transcript heretofore filed with the clerk of the Supreme Court of the United States with the application for a writ of certiorari shall be taken and held as and for the return of the clerk of the United States circuit court of appeals to the writ of certiorari heretofore issued from the said Supreme Court of the United States to said United States circuit court of appeals.

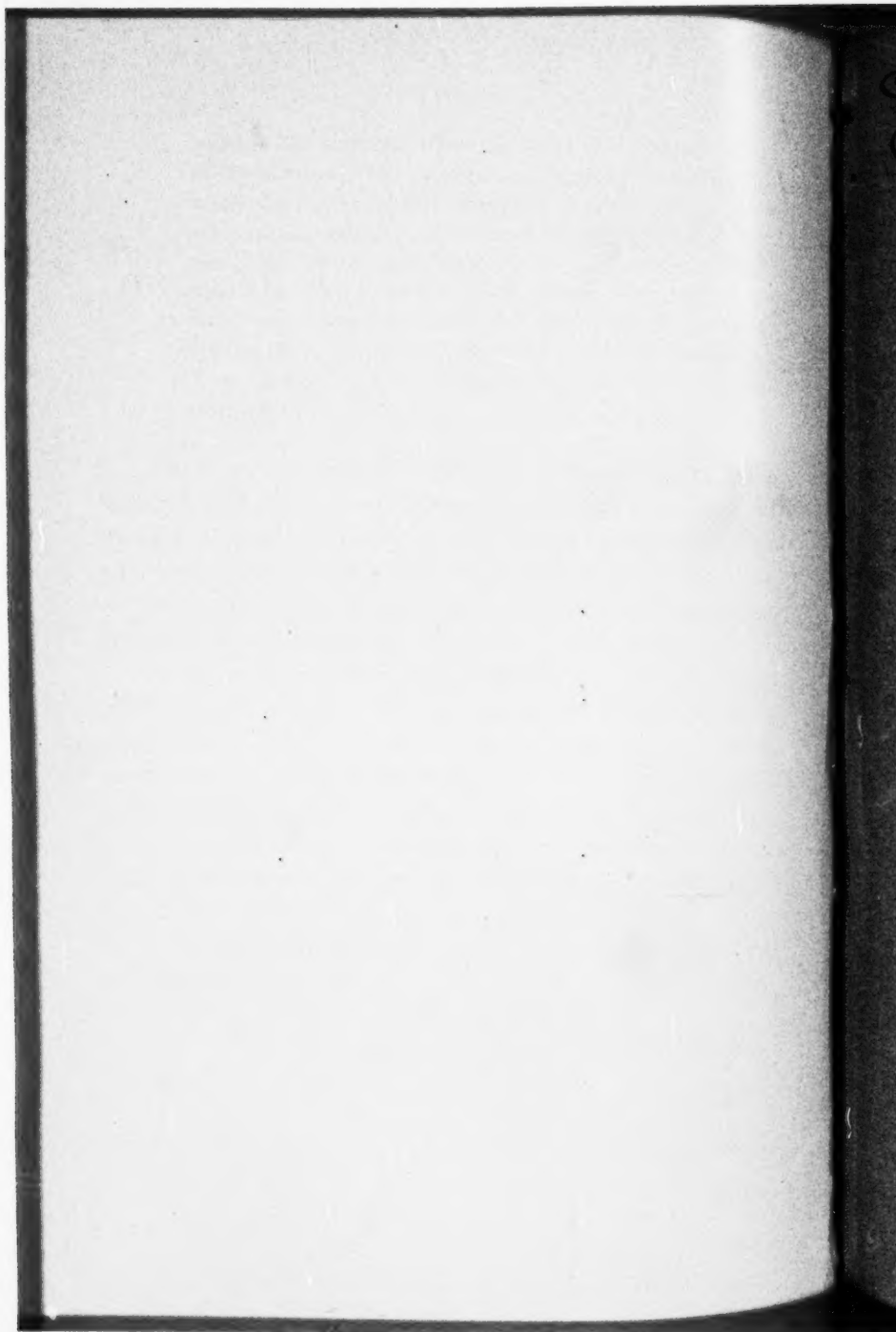
And it is further stipulated and agreed that the said clerk of the United States circuit court of appeals shall attach to the said writ of certiorari a certified copy of this stipulation with his return to said writ.

CHARLES H. ALDRICH,
CHAS. NAGEL, AND
BOYLE, PRIEST & LEHMANN,
Attorneys for Plaintiff in Error.
LEO RASSIEUR AND
B. SCHNURMACHER,
Attorneys for Defendants in Error.

Endorsed: De La Vergne Refrigerating Machine Co., plaintiff in error, *vs.* German Savings Institution *et al.*, defendants in error. Stipulation *in re* printed record. Filed Mar. 14, 1898. John D. Jordan, clerk.

492 [Endorsed:] Case No. 16,792. Supreme Court U. S., October term, 1898. Term No., 240. The De La Vergne Refrigerating Machine Co., petitioner, *vs.* The German Savings Institution *et al.* Writ of certiorari and return. Office Supreme Court U. S. Filed Mar. 18, 1898. James H. McKenney, clerk.

Endorsed on cover: Case No. 16,792. U. S. C. C. of appeals, 8th circuit. Term No., 240. The De La Vergne Refrigerating Machine Company, petitioner, *vs.* The German Savings Institution *et al.* Filed February 7, 1898.



IN THE
Supreme Court of the United States.

OCTOBER TERM, A. D. 1897.

IN THE MATTER OF THE APPLICATION OF THE DE LA VERGNE
REFRIGERATING MACHINE COMPANY FOR A WRIT OF
CERTIORARI.

THE DE LA VERGNE REFRIGERATING MACHINE
COMPANY,

Petitioner,

vs.

GERMAN SAVINGS INSTITUTION ET AL.,

Respondents.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE
EIGHTH CIRCUIT.

BRIEF AND ARGUMENT IN SUPPORT OF PETITION
FOR WRIT OF CERTIORARI.

Statement of Facts.

This petition is addressed to this court at the suggestion of the two judges of the Circuit Court of Appeals who heard the cause and who differed upon the question of the power of The De La Vergne Refrigerating Machine Company to make the contract set out in the record. It was also suggested that the petition for the writ should be

promptly filed, so as to secure action by this court, if possible, before the expiration of the time within which a petition for a rehearing can be filed in the Court of Appeals.

The petition and record show that the several plaintiffs were stockholders in a manufacturing company known as the Consolidated Ice Machine Company, organized under the laws of the State of Illinois, and having its principal office at Chicago, which became insolvent and made an assignment, for the benefit of its creditors, of all its property of every nature and description to Robert E. Jenkins, as assignee, on October 14, 1891.

On April 16, 1891, The De La Vergne Refrigerating Machine Company, by its president and principal stockholder, John C. De La Vergne, made the contract set out in the petition and record. This was done without authority of the stockholders or directors of his company. There is no plea of *non est factum*, and, for the purpose of the question now addressed to the court, the contract must be deemed the contract of the corporation. The assets of the corporation were in the possession of the assignee under deed, and he has since disposed of them, including the good-will, to others. The Consolidated Ice Machine Company therefore transferred nothing to The De La Vergne Company or to Mr. De La Vergne by the contract of April 16, 1891. It had nothing to convey. The stockholders made a partial delivery of their shares of stock. The De La Vergne Company refused to carry out the contract, and the several shareholders brought separate actions at law in the Circuit Court of the City of St. Louis for the value of their several share holdings, basing their action upon the contract referred to. These actions were removed by the defendants, citizens of New York, to the Federal Court, there consolidated and tried

upon an agreed statement of facts, set out in the petition and record, resulting in a judgment for the defendants. A writ of error was taken to the Court of Appeals, and the judgment there reversed. (*German Savings Inst. v. De La Vergne Machine Co.*, 36 U. S. App., 184.)

The court, in its opinion, was very severe in its strictures upon the defendant company, assuming that it had received the assets of the Consolidated Ice Machine Company and the good-will of its business, benefited by the suppression of the competition of that company, and obtained legal control of the suppressed corporation, and after obtaining the benefit of the contract had failed and refused to pay the agreed price therefor, on the technical ground that less than one-fourth of the stock of the corporation that had conveyed to it all of its assets and the good-will of its business had been imperfectly assigned. The court said that there was no evidence in the record that had any substantial merit, and it was exceedingly difficult to see how any failure to assign this small minority of the stock could result in any injury to the defendant, and proceeded:

“After the conveyance and covenant of April 16, 1891, was executed and delivered, the corporation was nothing but an empty shell. All its valuable rights and property had been vested in the De La Vergne Company, and the legal control of the shell itself was given to De La Vergne by the valid assignment of a majority of the stock of the corporation. These defendants cannot retain these benefits and thus make \$100,000 for themselves and throw a loss of \$100,000 on the stockholders of this corporation, because they technically failed to perform their contract in the slight and immaterial particular that they did not legally assign a small minority of this stock.” (36 U. S. App., 195.)

“Further, an offer to return them on September

12, 1891, if sufficient in form, would have been an idle ceremony. The defendants had undoubtedly then derived all the benefits of a performance of the contract by the Consolidated Company and its stockholders that they could ever derive. They still held the right to its assets, subject to its debts, the good-will of its business, and the covenant of its stockholders which suppressed its competition. No doubt, they had secured its customers and destroyed all possible competition. The return to the stockholders of the control over the empty shell of their corporation would have been a useless act. A merchant cannot, by offering to return the empty box, successfully defend an action for the purchase price of a box of goods, on the ground that the box was defective, when he has received and sold the goods." (36 U. S. App., 196.)

In interpreting this contract the court further said:

"The rights and benefits which the defendants were to receive from this contract were, the right of the Consolidated Company to its assets, subject to the payment of its debts; the good-will of its business, which had been established for six years; the suppression of the competition of that company and its stockholders, and the legal control of the suppressed corporation . . . they received, retained, and had the benefit of all these rights and interests." (36 U. S. App., 194.)

When this decision was announced the appellants moved in the Court of Appeals that the order of reversal granting a new trial be modified, and that the reversal be with directions to enter judgment in favor of the several plaintiffs. This was refused, and the action stood for a new trial. Amended answers were filed. The sixth, seventh and eighth paragraphs of answer raised the issue distinctly that the contract was *ultra vires* of both the De La Vergne Refrigerating Machine Company and the Consolidated Ice Machine Company under the laws of their respective charter states. (R. 22-24.) Much testimony

was taken, the most of which has no bearing upon the particular question now presented to this court. It is sufficient to say that the inference of the Court of Appeals that the De La Vergne Company profited by the contract, and the harsh criticisms of its conduct indulged in by the court, were shown to be wholly unfounded. Mr. Knight, who represented the majority of the creditors in the assignment proceedings, testified that the De La Vergne Company never received any of the assets (R. 101); Mr. Jenkins, the assignee, made the same statement (R. 110); Mr. Bender, the manager of the De La Vergne Company, testified to the same effect (R. 194, 195); Louis De La Vergne also (R. 205); Louis Barron, assistant manager, also (R. 220); also Charles H. Cone, the former secretary (R. 243). There is also the affirmative proof in the record, and it was found by the court (R. 422, 423), that on May 4, 1891, *only eighteen days after the date of the contract, and before the date fixed therein for its execution*, the court entered an order to sell all the assets of the insolvent company, and they were subsequently sold to other than the defendants. (R. 424.)

Instead of being a case where the petitioner had received value, as originally supposed by the Court of Appeals, the record presents a case where a large recovery was sought for the confessedly partial delivery (36 U. S. App., 194) of stock in an insolvent corporation, forbidden by its charter to have an indebtedness beyond its capital stock, and yet shown to have been indebted to more than five times its valid stock, if we are to believe the recitals of the contract of April 16, 1891, that its stock was \$100,000. The hardship and wrong was wholly on the other side. There was not a scintilla of evidence to the contrary.

The case was again submitted to the court without the

intervention of a jury, by stipulation in writing waiving a jury, and the court was requested to find the facts specially, together with conclusions of law therefrom.

The requested findings of fact submitted by the defendants are found in the Record (375-414). The propositions of law submitted by the defendant are also set out in the Record (414-416). The court found the facts specially. (R. 417-441.)

It will be noticed that the first request for finding submitted by the defendant company was as follows:

“ I.

“ The De La Vergne Refrigerating Machine Company is, and was at the time of the commencement of these actions, a corporation organized under the laws of the state of New York governing the organization of manufacturing corporations enacted on the 17th day of February, 1848, entitled ‘ An Act to authorize the formation of corporations for manufacturing, mining, mechanical or chemical purposes,’ and which laws, in and by the terms thereof, provide that ‘ it shall not be lawful for such company to use any of their funds in the purchase of any stock in any other corporation;’ and said corporation, during the year 1890 and prior and subsequent thereto, was engaged in the business of manufacturing and selling refrigerating machinery, having its principal office and place of business at the foot of 138th Street in the City and State of New York.” (R. 375, 376.)

The court found upon this point:

“ I.

“ The De La Vergne Refrigerating Machine Company is, and was at the time of the commencement of these actions, a corporation organized under the laws of the State of New York governing the organization of manufacturing corporations enacted on the 17th day of February, 1848, entitled ‘ An Act to authorize the formation of corporations for manufacturing, mining, mechanical or chemical purposes,’

and acts supplemental or amendatory thereof." (R. 417.)

The difference consists merely in the failure to find as a fact the prohibitory language quoted from the laws of the State of New York, which under some circumstances would not be material, as the court might take judicial notice thereof and administer relief accordingly. It is submitted, however, that here the strictness applying to a special verdict was requisite, and that the parties were entitled to a finding upon every material issue in the case. The defendant company asked the court to hold as a conclusion of law:

"The stock of the Consolidated Company was a part of the consideration for the promise of the De La Vergne Company to pay \$100,000 in its own stock, or in cash, and the consideration being indivisible, and being illegal so far as the stock was concerned, the contract is illegal and void." (R. 415.)

The court found nothing upon this subject, and thus it happened that the findings were silent upon issues distinctly raised by the pleadings and upon which requests as to fact and law had been clearly made. There was no trial upon these issues. The questions were properly preserved by exceptions (R. 441, 442, 443), bill of exceptions, assignment of error. (R. 466, 469, 470.)

A writ of error was taken to the Court of Appeals; there was a summons in severance (R. 473, 474), where the cause was argued and submitted to Judges Thayer and Sanborn, who handed down the following *per curiam* opinion:

"PER CURIAM. The judges are divided in opinion upon the question whether or not the contract which is the basis of this action was *ultra vires* the De La Vergne Refrigerating Machine Company, and are of opinion that the other questions presented should be

determined in favor of the defendants in error. The judgment below is therefore affirmed by a divided court."

It has thus come about that, although the defendant company, by proper pleading and evidence, has sought to defend itself against this contract as prohibited by the laws of the state to which it owes its existence, yet it has been unable to obtain the opinion of any court thereon—the trial court, though making special findings of fact, choosing to remain silent upon this subject, and the Court of Appeals being equally divided thereon.

It was doubtless owing to this extraordinary condition of affairs that the two judges composing the Court of Appeals suggested that an application be made to this court for a writ of *certiorari*, that the issue might be determined and the party not mulcted in a large sum without having its principal defense passed upon by any court.

We, as counsel presenting the petition, feel that there are other such manifest errors in the record that it should be brought here as an entirety and all the questions receive the benefit of the judgment of this court. For example, the defendant John C. De La Vergne died testate after the action of the Court of Appeals reversing the first judgment and before any evidence was taken. He was not represented in the taking of the testimony. He was represented at the trial by William C. Richardson, Public Administrator of the City of St. Louis, notwithstanding the fact that the defendant company offered to show that he had no estate in the State of Missouri (R. 38, 39, 374); and the court below finds a judgment against such administrator, *notwithstanding the fact that the court below in its finding of facts does not find that John C. De La Vergne is dead*. This subject is not mentioned with the intention of discussing it on the present

application, but simply to show the incomplete nature of the findings in the court below, upon which the judgment purports to be based.

On the present application, the argument will be confined to the single question of *ultra vires*, upon which the trial court was silent and concerning which the Court of Appeals divided; it being assumed that if this court grants the petition for *certiorari* we shall be permitted, if the court considers the entire record, to file a brief and be heard in argument upon the other errors assigned.

BRIEF.

I.

The assets of the Consolidated Company, insolvent, being in the hands of an assignee under the insolvent laws of Illinois and in due process of administration, the stock owned by the respective plaintiffs was the only thing attempted to be delivered under the contract, and was the only thing capable of passing by such contract, and must, therefore, be deemed the subject of the contract.

Humphreys v. McKissock, 140 U. S., 304.

Smith v. Hurd, 12 Metc., 371, 385.

Railroad Co. v. Howard, 7 Wall., 392.

Whistler v. Foster, 14 C. B. (N. S.), 248.

Fawcett v. Osborne, 31 Ill., 425.

Benton v. Curyea, 40 Ill., 320.

Story on Sales (3rd Ed.), Secs. 188, 423.

Linn v. Thornton, 1 C. B., 379.

Huling v. Cobell, 9 W. Va., 522.

Low v. Peck, 108 Mass., 349.

That all the title of the Consolidated Ice Machine Company passed by the deed to the assignee on October 14, 1890, leaving no title, legal or equitable, in the insolvent company or its individual shareholders to which the contract of April 16, 1891, could attach.

Weber v. Ulich, 131 Ill., 520, 533, 534.

Walker v. Ross, 150 Ill., 56.

Spindle v. Shreve, 111 U. S., 545.

As to the claim that the transfer of the stock was only incidental to the main purpose of the contract, which the respondents assert and one of the judges intimated was to convey the assets subject to the debts, and the stock was therefore only incidental as a means for further assurance of title, it is submitted that it was even then *a part* of the consideration for an indivisible promise, and being unlawful, the entire contract is void.

Bishop on Contracts, Sec. 74.

Widoe v. Webb, 20 Oh. St., 431.

Carleton v. Woods, 28 N. H., 290.

Deering v. Chapman, 22 Me., 488.

Ocean M. Co. v. Polleys, 13 Pet., 157, 164.

McBlair v. Gibbs, 17 How., 232.

Dent v. Ferguson, 132 U. S., 50, 64-66.

Armstrong v. American Ex. Bank, 133 U. S., 433, 469.

II.

The stock of the Consolidated Ice Machine Company was a part of the consideration for the promise of the De La Vergne Company to pay \$100,000 in its own stock or in cash. The contract is ultra vires of the vendee company, and therefore illegal and void.

Laws of New York, 1848, Ch. 40, Sec. 8.

Id., 1890, Ch. 564, Sec. 40.

Boone, Law of Cor., Sec. 107.

Green's Brice *Ultra Vires*, p. 91, note b.

1 Morawetz Private Cor., Secs. 431, 433.

People v. Chicago Gas Trust Co., 130 Ill., 268, 284.

Milbank v. N. Y., L. E. & W. R. R. Co., 64 How. Pr., 20.

Talmage v. Pell, 7 N. Y., 328.

St. L., V. & T. H. R. Co. v. T. H. & I. R. Co., 145 U. S., 393.

Central Transportation Co. v. Pullman Car Co., 139 U. S., 24.

California Nat'l Bank v. Kennedy, 167 U. S., 362.

Marble Co. v. Harvey, 92 Tenn., 116.

Union Pacific Ry. Co. v. Chicago, M. & St. P. Ry. Co., 163 U. S., 564.

Alexander v. Cauldwell, 83 N. Y., 480.

Davis v. Old Colony R. R., 131 Mass., 258.

Applying to the act of 1890, supra, enacted before the contract upon which action was brought, but going into

force fifteen days after it was signed, but before the delivery upon either side under the contract.

Baily v. De Crespigny, L. R. 4, Q. B., 180.

Newby v. Sharp, L. R., 8 Ch. Div., 39.

2 Schouler Personal Prop., 287.

Benjamin on Sales, 571.

Campbell on Sales, 315.

Applying to the contract to increase the capital stock of the De La Vergne Company.

1 Morawetz on Cor., Sec. 434.

N. Y. & N. H. R. R. Co. v. Schuler, 34 N. Y., 30.

Railway Co. v. Allerton, 18 Wall., 235.

Scovill v. Thayer, 105 U. S., 143.

III.

The petitioner was entitled in the court below to a special finding upon the issue of ultra vires raised by its sixth, seventh and eighth pleas (R. 22-24), and the court having refused to find upon this issue, the judgment is void.

Cannot go to other parts of record to help finding out.

The E. A. Packer, 140 U. S., 360, 364, 365, bottom of page.

Special findings have same effect as special verdict by jury.

Saltonstall v. Britwell, 150 U. S., 417, 419.

Special verdict is had unless it finds all the facts in issue.

Ft. Scott v. Hickman, 112 U. S., 150, 164.

Ward v. Cochran, 150 U. S., 597, 608.

ARGUMENT.

I.

The assets of the Consolidated Company, insolvent, being in the hands of an assignee under the insolvent laws of Illinois and in due process of administration, the stock owned by the respective plaintiffs was the only thing attempted to be delivered under the contract, and was the only thing capable of passing by such contract, and must, therefore, be deemed the subject of the contract.

Since the question of *ultra vires* was raised, the claim is put forward that there was no sale of stock by the plaintiffs and no purchase of stock by the defendants below; that the sale was of the assets of the insolvent corporation theretofore conveyed by the corporation to the assignee, subject to the payment by the assignee of the debts, and that the transfer of the stock was a mere incident collateral to the main purpose of the contract. This interpretation of the contract is not sustained by its language, or the situation and conduct of the parties, and, even if the contention were admitted, for the sake of argument, it would not avail the respondents, as they would still be compelled to admit that the transfer of the stock was a *part* of the consideration.

The stock was the only property owned by the respondents. It was the only subject of attempted transfer. If we admit, for the purpose of argument, that upon the payment of the debts the title would revert, the reversion would be to the corporation—not to the shareholders. If an equity existed, it belonged to the corpora-

tion and not to the shareholders. If the corporation had anything to convey, the transfer would have been in the name of the corporation, by its proper officers thereunto duly authorized. If the other party to the contract failed to pay the consideration, the corporation, not the shareholders, either jointly or severally, must bring action to obtain redress.

The idea that all the shareholders of a corporation may, by uniting in a contract or deed, transfer the property of a corporation, is a mistake. If corporate property was the subject of transfer in this case, it should have been applied to the payment of the debts, which the record shows are, after a wise and economical administration of the estate, yet unpaid to an amount exceeding \$150,000. Again, if corporate property was the subject of transfer, the consideration therefor could only be obtained by the plaintiffs in the several actions through the ownership of their several shares of stock, and the defendant company could acquire the property, if at all, in view of the previous conveyance to the assignee, only through the ownership of the stock. This made the stock, in any view of the case that it is possible to take, an essential element of the transfer.

It is thought that these several statements are abundantly sustained by the authorities.

In the case of *Humphreys v. McKissock*, 140 U. S., 304, the facts were that the old Wabash Company had executed a mortgage on its Council Bluffs Division, together with all the privileges, rights, franchises, real estate, right of way, depots, depot grounds, side-tracks, water-tanks, engines, cars and other appurtenances thereunto belonging. The Wabash and six other railroad companies organized an elevator company to build and operate an elevator at Council Bluffs, each company sub-

scribing to one-seventh of the stock. The mortgagee of the Council Bluffs Division claimed under his mortgage what he described as the one-seventh interest of the Wabash in the elevator. The court denying this claim, says that the facts found by the court, which decided in favor of the mortgagee, "show beyond controversy the independent existence of that (the elevator) corporation, and that the railroad company had no specific interest in its elevator or other property which it could mortgage."

The court quotes with approval what was said by Chief Justice Shaw in *Smith v. Hurd* 12 Mete., 371, 385, viz:

"The individual members of a corporation, whether they should all jointly or each act severally, have no right or power to intermeddle with the property or concerns of the bank or call any officer, agent or servant to account or discharge them from any liability. Should all the stockholders join in a power of attorney to anyone, he could not take possession of any real or personal estate, any security or chose in action; could not collect a debt or discharge a claim or release damage arising from any default; *simply because they are not the legal owners of the property*, and damage done to such property is not an injury to them. Their rights and their powers are limited and well defined."

To this same effect is *Pullman Co. v. Mo. Pac. Co.*, 115 U. S., 587.

"*Nemo dat quod non habet.*" This maxim expresses the principle that one who has no title cannot confer a title as expressed by Willis, J., in *Whistler v. Foster*, 14 C. B. (N. S.), 248.

The idea has been reiterated in the form: "No one can sell a right when he himself has none to sell;" and it has been declared that this proposition is so self-evident that argument cannot elucidate or strengthen it.

14 Cent. Law J., 146.

"The general rule of law, sanctioned by common sense, is that no man can, by his sale transfer to another the right of ownership in a thing wherein he himself has not the right of property."

Fawcett v. Osborn, 32 Ill., 425.

Benton v. Curyea, 40 Ill., 320.

"The general rule is, that the subject of the sale must belong to the vendor, and that he can sell no more than the interest, which he legally possesses."

Story on Sales (3rd ed.), Sec. 188.

"Again if the vendor wholly fails to make a title to the vendee in an executory contract, the vendee may rescind the contract."

Story on Sales (3rd ed.), Sec. 423.

Tindal, C. J., in delivering the opinion of the court, in *Linn v. Thornton*, 1. C. B., 379, said:

"It is not a question whether a deed might not have been so framed as to have given the defendant a power of seizing the future personal goods of the plaintiff, as they should be acquired by him, and brought on the premises, in satisfaction of the debt, but the question arises before us on a plea which puts in issue the *property* in the goods, and nothing else; and it amounts to this, whether by law a deed of bargain and sale of goods can *pass the property* in goods which are not in existence, or, at all events, which *are not belonging to the grantor at the time of executing the deed*." Held, in the negative.

In *Huling v. Cobell*, 9 W. Va., 522, it appeared that an agricultural society assigned for the benefit of its creditors the proceeds of a fair about to take place on its grounds. It was held that such an assignment was void as against the lien of an execution issuing before the payment of the proceeds to the creditors. Mr. Justice Green, in his opinion, discusses the general subject, and says the rule is *that a sale of property in which the vendor has no present interest is void*.

"It is an elementary principle of the law of sales, that a man cannot grant personal property in which he has no interest or title. To be able to sell property, he must have a vested right in it at the time of the sale."

Lane v. Peav, 108 Mass., 349.

In *McGoon v. Aakeny*, 11 Ill., 558, it was held to be law that the real owner of personal property cannot sell his right or title in it to another while it is in the actual or adverse possession of one who claims title to it.

"Hence, the general rule is stated to be, that a purchaser of property takes only such title as his seller has, and is authorized to transfer; that he acquires precisely the interest which his seller owns, and no other or greater."

Barnard v. Campbell, 55 N. Y., 460.

If, after the payment of all debts, there should remain in the hands of the assignee any surplus of the proceeds of sales and collections, such surplus belongs to the assignor. But this right of the assignor to the surplus does not exist until all debts are paid. When they are paid, it is called into existence.

Burrill on Assignments, 712.

Butler v. Thompson, 4 Abb. N. C., 290.

Briggs v. Davis, 21 N. Y., 574.

Sandmeyer v. Dakota F. & M. Co. (S. Dak.), 50 N. W., 353.

Before debts are paid this right is uncertain, indefinite, a mere possibility. It cannot be determined until debts are paid, and until that time it is not known whether there will be a surplus or a deficit; no doubt this right to the surplus, if any, is a valuable right, but it is held adversely. An assignment is made for the benefit of creditors, and until they are paid everything of value is vested in the assignee in trust for them. Such indefinite

right as this resulting trust in favor of the assignor is not subject to sale by shareholders. It belonged to the assignor, which, in the present case, is the Consolidated Company.

The Illinois statutes respecting assignments, in so far as it provides for a discontinuance of proceedings, is as follows, viz.:

"All proceedings under the Act of which this is amendatory, may be discontinued upon the assent, in writing, of *such debtor*, and a majority of his creditors in number and amount; and in such cases, all parties shall be remitted to the same rights and duties existing at the date of the assignment, except so far as such estate shall have already been administered and disposed of; and the court shall have power to make all needful orders to carry the foregoing provision into effect."

Revised Statutes (Ill., 1897), "Assignments,"
Section 15.

Nothing could be done under this statute except by aid of the debtor, the Consolidated Company. The assent requisite is that of the debtor and a majority of the creditors in number and amount.

The De La Vergne Company did not by the contract become the debtor, for it expressly refused to assume liability for debts of the Consolidated Company. (Sixth article of contract, R. 45.) It had bargained for the stock of the company, and through this stock, and only through this stock, could it secure the assent in writing of the debtor.

So the contract, having in view the fact that the assent of the debtor is necessary to a discontinuance of the assignment proceedings, provides in its fourth clause that the stock shall be assigned as prescribed, "for the purpose of placing the said party of the third part (the De

La Vergne) *in complete control* of the assets of the party of the first part, subject to the legal rights of said assignee and the creditors of said party of the first part."

The stock was necessary not only to "complete control," but it was necessary to any control whatever.

Conceding that the Consolidated Company was an empty shell, in the sense that it was insolvent, and did not contemplate a resumption of business, the fact remains that the assets which had belonged to it could be reached only through it, and it could be reached only through its stock.

The stock of the Consolidated Company was then the vital element of the consideration to the De La Vergne Company, even though the value of this stock was to be realized through the acquisition by the De La Vergne of the former assets of the Consolidated Company.

Assume that the contract contained no provision for a sale of stock, and leave the contract one in form and in fact as the plaintiffs say it is in essence, one for the sale of the former assets of the Consolidated, subject to the rights of the assignee and the creditors, and what would the defendant receive by the contract?

The right to discontinue the assignment, a majority of the creditors in number and amount consenting, the only right of any kind in respect to its assets remaining to the Consolidated Company after the assignment, was not conveyed by the contract and could not be so conveyed.

No court would at the suit of the De La Vergne Company compel it to assent. The matter was one between it as a debtor and its creditors.

It seems clear, therefore, from the law of Illinois, and from the language of the contract, that this possibility of discontinuing the assignment by composition or other arrangement with creditors was the one thing of possible

value connected with the assets of the insolvent company. This and the corporate existence might be utilized for some purpose, but, and this is true as to both of them, *only through the stock.*

We are bound to conclude that the stock was a part of the consideration.

On the 1st day of December, 1891, Mr. Jenkins, as assignee of the Consolidated Company, sold to John Featherstone's Sons the good-will, machinery, patterns, etc. (R. 93.)

The bills and accounts receivable were collected by the assignee and by Knight and Butz, and distributed by them among the creditors.

There is, therefore, nothing that the defendants received unless it be the shares of stock. It has been shown that these shares were not evidence of any present interest in property.

But let us assume that stock ownership in a corporation which has executed an absolute assignment under the insolvent law by which all its property and every *legal* and *equitable interest therein* is vested in the assignee means the same thing as stock ownership in a solvent running corporation. What is the situation then?

The certificates of stock were evidence of the ownership of a distributive share in the surplus after debts are paid.

“A share of the capital stock merely gives the right to partake, according to the amount put into the fund, of the surplus profits of the corporation, and ultimately on the dissolution of it, of so much of the fund thus created as remains unimpaired and is not liable for debts of the corporation.”

Thompson, Commentaries on Law of Corporations,
Sec. 1071.

This is a fundamental principle.. It is not necessary to cite further authorities.

The assets lacked \$150,000 of being sufficient to pay the debts of the Consolidated Company. (R. 109.) What is the value of a distributive share in a deficiency of \$150,000?

It is idle to talk of the shares in the Consolidated Company being evidence of a distributive share in anything of value, at the time of the contract.

If the corporation was not insolvent, it was a fraud to assign.

Gardner v. Commercial National Bank, 95 Ill., 298.

But this assumption cannot be made; the title to all the assets passed to the assignee absolutely. Distributive ownership in the company is then impossible. The only thing of value that possibly did not pass to the assignee is the franchise, the right to be a corporation.

But all the title of the Consolidated Ice Machine Company passed by the deed of the assignee on October 14, 1890, leaving no title, legal or equitable, in the insolvent company or its individual shareholders, to which the contract of April 16, 1891, could attach.

By the agreed statement of facts, as well as by the express terms of the deed of assignment, there passed to the assignee all the property of the Consolidated Ice Machine Company wherever situated, including the patent rights, outstanding accounts "and the good-will of its business." (R. 383.) This good-will was subsequently advertised for sale by the assignee, under the order of the court, together with \$100,000 of the capital stock of the company not embraced in the sale to De La Vergne. (R. 152.) The assets and good-will were subsequently sold, likewise under the order of the court, to Clarence A. Knight

and Otto C. Butz, as trustees, for \$309,000 of the claims against the estate, including a portion of the complainant's herein. (R. 156, 158, 159.) Knight and Butz afterwards, under order of court, sold the assets so acquired, including the good-will, to John Featherstone's Sons; and subsequently, by formal deed, conveyances were made by these respective parties. (R. 93, 90.)

It is thus clearly shown by the record that the assumption of the learned court deciding this case (36 U. S., 184), that the De La Vergne Company acquired the good-will or any portion of the assets of this company at any time, is wholly erroneous, as by undisputed evidence in the case (R. 109) there remains \$150,000 of the indebtedness of the company yet unpaid after the estate is fully administered.

In the absence of these express provisions of the deed of assignment and orders of court, and conveyances made in pursuance thereof, such an assignment, under the statute of the State of Illinois regulating assignments by insolvent debtors, left no title, legal or equitable, in the insolvent Consolidated Company which was the subject of conveyance. Being an Illinois corporation, assigning under the laws of the State of Illinois, the effect of the assignment has, of course, to be determined by the decisions of the highest court of that state.

In *Weber v. Mick*, 131 Ill., 520, 533, 534, the court said that the

“assignment is an absolute appropriation of the property to the payment of the debts,” passing both legal and equitable title to the property “absolutely beyond the control of the assignor.” . . . “Such assignments have always been understood to be instruments voluntarily executed by a failing debtor by which he assigns to some third person, as assignee

or trustee, the whole, or sometimes the bulk, of his property, to be by such trustee distributed among the assignor's creditors, in satisfaction of their demands."

In *Burrill on Assignments*, 10, it is said:

"An assignment is likewise an absolute conveyance by which both legal and equitable estate is divested out of the grantor, but the title vested in the assignee is subject to the uses and trusts in favor of the creditors, and upon their satisfaction a trust results in favor of the assignor in the residue of the unappropriated property or its proceeds."

The Supreme Court of the United States, in passing upon the effect of an assignment of an insolvent debtor under the Illinois law, in *Spindle v. Shreve*, 111 U. S., 545, said:

"The Court of Appeals of Kentucky, in *Knefler v. Shreve*, 78 Kentucky, 297, had before it the very question as to the construction of this deed, and decided that all the estate and interests in property, which, at its date, the grantor held, which he could alien, and which was liable at law or in equity for the payment of his debts, passed by its terms; and in that decision we concur."

In *Walker v. Ross*, 150 Ill., 56, the court said:

"These cases further hold that there must be an absolute transfer of the whole interest of the assignor, legal and equitable, in the property assigned in trust for the benefit of creditors."

In *Stoddard v. Gilbert*, 163 Ill., 131, 135, there was an attempt to convey property while it was yet in the hands of the assignee, and it was held that the agreement could only become operative upon the discontinuance of the proceedings.

By these decisions it is established that there was no property right of any nature or description whatsoever

remaining in Consolidated Ice Machine Company on April 16th, 1891, that could be made the subject of conveyance or transfer by that company. As has been said, all property rights of the insolvent corporation had vested in its assignee. Any other decision would be monstrous, as it would enable shareholders to protect their interests without paying their creditors.

It thus appears that the only property or property right that the parties of the first and second part to the contract of April 16th, 1891, could convey were their individual shares in the capital stock of the corporation; and certainly their ownership of these shares is the only right possessed by them and which they could convey, which would justify an action by them against the petitioner, or its president. This seems to make it unnecessary to consider the argument that was addressed to the Circuit Court of Appeals, and which seems to have impressed one of the judges, that the transfer of the stock was only incidental to the contract, and therefore the defense of *ultra vires* could not wholly avoid it. In adopting this proposition the learned judge overlooked a distinction which he had himself previously drawn in the case of the *Illinois Trust & Savings Bank v. Arkansas City*, 40 U. S. App., 257, 274, where he said:

“It is that when a part of a divisible contract is *ultra vires*, but neither *malum in se* nor *malum prohibitum*, the remainder may be enforced, unless it appears from a consideration of the whole contract that it would not have been made independently of the part which is void. *Oregon Steam Navigation Company v. Winsor*, 20 Wall., 64, 70; *Reagan v. Farmers' Loan and Trust Company*, 154 U. S., 362, 395; *Western Union Telegraph Co. v. Burlington & Southwestern Ry. Co.*, 11 Fed. Rep., 1, 4, and cases cited in note at page 12; *Saginaw Gas-Light Co. v. City of Saginaw*, 28 Fed. Rep., 529, 540.”

In the case at bar the transfer of the stock was a part of the consideration. The contract was indivisible in this respect, and the only attempted performance was that of a partial delivery of the stock. There was no attempt to deliver anything else. The promise to issue a like amount of stock of the De La Vergne Company, or, at the option of Mr. John C. De La Vergne, to pay \$100,000 in money—an option which he never exercised—was only to become binding upon the delivery of \$100,000 of the stock of the insolvent company, and was a promise to the shareholders as such. The delivery and payment were to be made to the individual shareholders, in proportion to their respective holdings. It was not, therefore, using the language of the learned court in the former opinion, in which he is sustained by authority, “a divisible contract . . . neither *malum in se* nor *malum prohibitum*,” but it was an indivisible contract, *malum prohibitum* by two express enactments of the laws of the State of New York governing the rights of the De La Vergne Company, as will appear in the discussion of the next proposition.

Mr. Bishop, in his work on Contracts, Section 74, thus states the rule:

“Where the consideration for an indivisible promise is *in part* something done in violation of law, and in remainder some lawful thing, the promise cannot find support on the lawful part without resting also on the unlawful, and the whole will be void. But if there are two promises, the one founded on the unobjectionable in the consideration and the other on the evil, the former will be sustained and the latter will fail.”

This statement of the law does not require argument or elaboration in this court. Other authorities are cited in the brief.

II.

The stock of the Consolidated Ice Machine Company was a part of the consideration for the promise of the De La Vergne Company to pay \$100,000 in its own stock or in cash; the contract is ultra vires of the vendee company, and therefore illegal and void.

A corporation has such powers as are given it by its charter, and such implied powers as are necessary to carry out the corporate purpose.

This principle is well settled. In *Thomas v. Railroad Co.*, 101 U. S., 71, Mr. Justice Miller, speaking for the Supreme Court of the United States, said:

"We take the general doctrine to be in this country, though there may be exceptional cases and some authority to the contrary, that the powers of corporations organized under legislative statutes are such, and such only, as those statutes confer. Conceding the rule applicable to all statutes, that what is fairly implied is as much granted as what is expressed, it remains that the charter of a corporation is the measure of its powers, and that the enumeration of these powers implies the exclusion of all others."

Dartmouth College Case, 4 Wheat., 636.

Perrine v. Chesapeake, etc., Canal Co., 9 How., 177, at 184.

Metropolitan Bank v. Godfrey, 23 Ill., 531.

Caldwell v. City of Alton, 33 Ill., 417.

1 Morawetz Corporations, Sec. 316.

Taylor on Corporations, Sec. 120.

Bell, C. J., in *Downing v. Mt. Washington Road Co.*, 40 N. H., 230, said:

“Corporations are creatures of the legislature, having no other powers than such as are given to them by their charters, or such as are incidental, or necessary to carry into effect the purposes for which they were established.”

It is not, nor can it be, claimed that the charter under which the De La Vergne Company assumed to act gave it the power to purchase stock in another corporation.

It needs no argument to show that the purchase of stock in another corporation is not necessary to carry into effect the purposes of incorporation.

It matters not what the general rule may be, as such companies as the De La Vergne are prohibited from using funds to purchase stock in another corporation. Sec. 8, Chapter 40, Laws of 1848, of the State of New York, provides:

“It shall not be lawful for such company to use any of their funds in the purchase of any stock in any other corporation.”

It is established that The De La Vergne Refrigerating Machine Company was organized under this act and the amendments thereto. (R. 300.) The law of New York continued to prohibit investments by one manufacturing company in the stock of another until the enactment of Chapter 564, N. Y. Session Laws of 1890, approved June 7, 1890, and going into effect May 1, 1891. Section 40 of said chapter provides that:

“Any domestic corporation, transacting business in this state, and also in other states or foreign countries, may invest the funds in the stocks, bonds, or securities of other corporations owning lands in this state or such states, if dividends have been paid on such stocks continuously for three years immediately before such loans are made, or if the interest on such bonds or securities is not in default, and such stock, bonds and securities shall be continuously

of a market value 20% greater than the amount loaned or continued thereon; . . . no corporation shall use any of its funds in the purchase of any stock of its own or any other corporation, unless the same shall have been *bona fide* pledged, hypothecated, or transferred to it, by way of security for, or in satisfaction or part satisfaction of, a debt previously contracted in the course of its business, or shall be purchased by it at sales upon judgments, orders, or decrees which shall be obtained for such debts or in the prosecution thereof."

It affirmatively appears in the record, by a full copy of all directors' meetings of the Consolidated Ice Machine Company, as well as by testimony of witnesses, that the Consolidated Ice Machine Company never paid a dividend on its stock during its existence; and there is nothing to dispute the inference arising from the fact that its capital stock was \$200,000, of which \$100,000 was unpaid, except the sum of \$10,000, and that its indebtedness was \$550,000, which upon the administration of the assets has left \$150,000 wholly unpaid—that \$100,000 of the stock of the Consolidated Company never was continuously of a market value twenty per cent. greater than the price which it is alleged Mr. De La Vergne had, at his option, agreed to pay therefor.

The stock of the Consolidated Company was part of the consideration to the De La Vergne Company. This question has been adjudicated by the Circuit Court of Appeals as between these parties. (36 U. S. App., 184, 187.)

That was one of the questions in controversy on the first trial. Whether it was a *legal* consideration was a question not suggested.

In the statement of the case, in the first paragraph of the opinion, Judge Sanborn says the suit is by the German Savings Institution—

“for that portion of the purchase price of the assets, good-will, and *capital stock* of the Consolidated Ice Machine Company, a corporation, which the defendants in error promised to pay it,” etc.

The court held, as matter of law, that the Consolidated Company stock was part of the consideration, and they say that if the small minority of stock not transferred was of any value,

“the defendants may undoubtedly show that fact under proper pleadings, and offset the damage they have sustained by the failure to assign it, against the \$100,000 they promised to pay for the substantial benefits of this contract.”

In the absence of express statutory authority, a corporation cannot purchase stock of another corporation.

Boone on the Law of Corporations, Sec. 107, thus states the law:

“Without a power specifically granted, or necessarily implied, a corporation cannot become a stockholder in another corporation, and especially where the object is to obtain the control or affect the management of the latter.”

In Green's Brice's *Ultra Vires*, p. 91, note *b*, it is said:

“In the United States a corporation cannot become a stockholder in another corporation unless by power specifically granted by its charter, or necessarily implied in it.”

Morawetz on Private Corporations, Secs. 431, 433, says:

“A corporation has no implied right to purchase shares in another company for the purpose of controlling its management. . . . A corporation cannot, in the absence of express statutory authority, become an incorporator by subscribing for shares in a new corporation, nor can it do this indirectly through persons acting as its agents or tools.”

In *People v. Chicago Gas Trust Co.*, 130 Ill., 268, at 284 the court said:

"It has been held in many cases, that in the United States corporations cannot purchase, or hold, or deal in the stocks of other corporations, unless expressly authorized to do so by law, and that one corporation cannot become the owner of any portion of the capital stock of another corporation, unless authority to become such is clearly conferred by statute."

The following is taken from the syllabus of the case:

"The gas trust company mentioned was incorporated under the general law for two purposes, as expressed in the articles of association: First, for the purpose of erecting and operating gas works for the manufacture and sale of gas in Chicago and other places in this state; and second, 'to purchase and hold or sell the capital stock, or purchase, or lease, or operate the property, plant, good-will, rights and franchises of any gas works or gas company or companies, or any electric company or companies, in Chicago or elsewhere,' etc.

"The company sought to exercise the powers claimed under the second clause only, and for that purpose bought a majority of the shares of all the stock of all the gas companies in Chicago, being four in number, whereby it might have control of all the gas companies in the city, and thus destroy competition and monopolize the gas business. *Held*, that the corporation so formed was not for a lawful purpose, and that all acts done by it toward the accomplishment of such object were illegal and void."

At various times during the years 1873 and 1874 the Erie Railway Company purchased more than one-half of all capital stock of the Buffalo, New York & Erie Railroad Company, and paid for the same out of its corporate funds. *Held*, that such purchase was not necessary in the exercise of any of its corporate powers;

that it was unauthorized and in violation of the statute, and was consequently *ultra vires*.

Milbank v. New York, Lake Erie & Western R. Co., 64 Howard's Practice Reports, 20.

In *Talmage v. Pell*, 7 N. Y., 328, it was held that a corporation has no power to purchase the stock of other corporations for the purpose of selling them for profit, or as a means of raising money, except when such stocks have been received in good faith as security for a loan made or a debt due such corporation, or when taken in payment of such loan or debt.

In the case of *The Mechanics' Mutual Savings Bank v. Meridan Agency Company*, 24 Conn., 159, it was held that a company organized to do a general insurance agency, commission and brokerage business has no power to subscribe to the stock of a savings bank and building association.

In the case of *The Central Railroad Company v. The Pennsylvania Railroad Company*, 31 N. J. Eq., 475, it was held that a corporation cannot, in its own name, nor in the name of individuals, subscribe for stock or be a corporation under the general railroad law.

Kennedy v. Railroad, 62 N. H., 537.

Hotel Co. v. Schram, 6 Wash., 134.

Franklin Co. v. Lewiston Inst. for Savings, 68 Me., 46.

It is thus established by the great weight of authority that an agreement by one corporation to purchase stock in another is *ultra vires*. An *ultra vires* contract is illegal and void.

St. Louis, Vandalia & Terre Haute R. Co. v. Terre Haute & Indianapolis R. Co., 145 U. S., 393.

It is shown by the report of the De La Vergne case, in 36 U. S. App., p. 190, that it was mistakenly considered in the nature of a suit for specific performance. No action can be brought to compel specific performance of an *ultra vires* contract, which is illegal and void.

Bank of Michigan v. Niles, Walker's Chan. R. (Mich.), 99.

In the case of *The Central Transportation Co. v. Pullman Car Co.*, 139 U. S., 24, the plaintiff company had leased and transferred all of its property of every kind to the defendant company, which was engaged in a similar and competitive business. The lessee company undertook to pay all of the debts of the lessor company, and to pay to it annually the sum of \$264,000 for a term of ninety-nine years. The suit was for a part of the installment for the last year before suit. The defense of *ultra vires* was interposed and sustained, the court holding that the sale was unauthorized and in excess of the power of the selling company. It was urged for the plaintiff, as in this case, that, even if the contract was void, because *ultra vires* and against public policy, yet that, having been fully executed on the part of the plaintiff, and the benefits of it received by the defendant for the period covered by the declaration, the defendant was estopped to set up the invalidity of the contract as a defense to an action to recover the compensation agreed on for that period.

After reviewing the prior decisions upon this branch of the case, the court said (p. 59):

“The view which this court has taken of the question presented by this branch of the case, and the only view which appears to us consistent with legal principles, is as follows: A contract of a corporation which is *ultra vires* in the proper sense, that is

to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the Legislature—*is not voidable only but wholly void, and of no legal effect.* The objection to the contract is not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it. When a corporation is acting within general scope of the powers conferred upon it by the Legislature, the corporation, as well as the persons contracting with it, may be estopped to deny that it has complied with the legal formalities which are prerequisites to its existence or to its action, because such requisites might in fact have been complied with. But when the contract is beyond the powers conferred upon it by existing laws, neither the corporation nor the other party to the contract can be estopped, by assenting to it or by acting upon it, to show that it was prohibited by those laws.

“A contract *ultra vires*, being unlawful and void, not because it is in itself immoral, but because the corporation, by the law of its creation, is incapable of making it, the Courts, while refusing to maintain any action upon the unlawful contract, have always striven to do justice between the parties, so far as it could be done consistently with adherence to law, by permitting property or money, parted with on the faith of the unlawful contract, to be recovered back, or compensation to be made for it. In such case, however, *the action is not maintained upon the unlawful contract, nor according to its terms*, but on an implied contract of the defendant to return, or, failing to do that, to make compensation for property or money which it has no right to retain. To maintain such an action is not to affirm, but to disaffirm, the unlawful contract.”

The case at bar is not to recover the value of the stock delivered, but to enforce the unlawful sale of stock against

the corporation prohibited by its charter from making the purchase.

In the case of *California National Bank v. Kennedy*, 167 U. S., 362, which reasserts the principles laid down in *Central Transportation Co. v. Pullman Car Co.*, the court said:

“The lease sued on having been executed by the defendant contrary to the express prohibition of the statute, which peremptorily forbade the corporation to transact any business unless to perfect its organization, and thus denied it the capacity to enter into any contract whatever, except in perfecting its organization, *the lease is void*, and cannot be made good by estoppel, and will not support an action to recover anything beyond the value of what the defendant has actually received and enjoyed.”

In *Marble Company v. Harvey*, 92 Tenn., 116, the Marble Company, an Ohio corporation, contracted with Harvey to take shares in a Tennessee corporation doing a like business; the consideration was \$6,000, the defendant assuming and agreeing to stand one-half the loss accruing to plaintiff in consequence of suits pending against the Tennessee corporation. The relief sought was to compel defendant to pay one-half the loss accruing. The defense of *ultra vires* was set up. It was held that “the suit is clearly in furtherance of the original, unlawful and void contract. That the contract has been executed by the plaintiff does not make it lawful or entitle it to an enforcement of it. It is in no sense a suit in disaffirmance.”

This Tennessee case is so conclusive in its argument, and so exactly parallel in its facts to the case at bar, that any short citation does not enable the court to appreciate its importance in the present discussion. It shows that the contract in this case was executory, and that, to en-

able the plaintiffs below to recover, it is necessary for the court to give effect to a corporate act which is absolutely forbidden by the express terms of statutes regulating the powers of both the vendor and vendee companies.

It is urged by the plaintiffs in this case, as in the *Central Transportation Co. v. Pullman Car Co.*, that, even if the contract was void, because *ultra vires* and against public policy, yet that, having been fully executed on the part of the plaintiff, and the benefit of it received by the defendant, the defendant was estopped to set up the invalidity of the contract as a defense to an action to recover the consideration agreed on.

The Supreme Court, however, in the *Central Transportation Co.* case would not allow that defense to prevail, holding the contract *ultra vires* and void, and therefore no performance on either side could give the contract any validity, or be the foundation of any action upon it.

In *California Nat'l Bank v. Kennedy*, 167 U. S., 362, the bank became a stockholder in a savings bank, and while such stockholder received dividends on the stock. Both banks failed, and an attempt was made to charge the bank as a stockholder in the savings bank. By virtue of the federal statutes, under which the bank was organized, it had no power to become a stockholder in another corporation. The Superior Court of California adjudged the national bank to be the holder of shares in the savings bank and responsible to the creditors of the savings bank in proportion to its holdings. An appeal was taken to the Supreme Court of the state, which affirmed the judgment. On a writ of error to this court the judgment was reversed.

The court, speaking by Mr. Justice White, held that

“a national bank has no power to deal in stocks, and cannot, therefore, acquire the stock of another corporation, except as incidental to its power to lend money on personal security.”

“The purchase by a national bank of the stock of another corporation, not as incidental to the banking business, *being void cannot be ratified, and therefore the bank is not estopped to deny its liabilities, for the debts of such corporation, though it has received dividends on the stock.*”

The reasoning of the learned court is shortly as follows: That corporations have such powers only as are conferred upon them by statute, quoting from *Central Transportation Co. v. Pullman Car Co.*

The power to deal in stock of another corporation being not expressly conferred upon national banks, nor an act which may be exercised as incidental to the powers expressly conferred, a dealing in stocks is consequently *ultra vires*.

Being such, it is without efficacy.

The learned court deals with the question of estoppel in the following manner:

“The claim that the bank, in consequence of the receipt by it of dividends of the stock of the savings bank, is estopped from questioning its ownership and consequent liability, is but a reiteration of the contention that the acquiring of stock by the bank under the circumstances disclosed was not void, but merely voidable. It would be a contradiction in terms to assert that there was a total want of power by any act to assume the liability, and yet to say that by a particular act the liability resulted. The transaction, being absolutely void, could not be confirmed or ratified,”

and ends the opinion by quoting from the language of Mr. Chief Justice Fuller in *Union Pacific Ry. Co. v. Chicago, M. & St. P. Ry. Co.*, 163 U. S., 564:

“A contract made by a corporation beyond the scope of its powers, express or implied, on a proper construction of its charter, cannot be enforced, or rendered enforceable, by the application of the doctrine of estoppel.”

This, we submit, is a conclusive answer to the plaintiff's contention.

Granting, for the sake of argument, that the contract was entirely executed on the part of the Consolidated Company and that the De La Vergne Company got everything it bargained for (which we deny), it is not estopped from setting up the defense of *ultra vires*.

The agreement to purchase stock in the Consolidated Company was illegal and void. It was an agreement which the De La Vergne Company was not authorized to make. This action was originally brought to enforce the payment of the purchase price, and is clearly in furtherance of the original, void contract. It is in no sense an action in disaffirmance. A court of law will not aid in enforcing a contract which one of the parties had no authority to make, and which was illegal and void.

The only course the plaintiff could have pursued was to disaffirm the contract and sue the defendant on the implied contract to return; or, failing to do that, to make compensation for property which it had no right to retain.

The record clearly shows that the defendant received nothing which it could retain; there is not a scintilla of testimony in conflict with that statement.

John C. De La Vergne and the Consolidated Company and stockholders thereof knew, at the time the contract was made, that the De La Vergne Company had not the power to enter into the agreement by which they attempted to bind it. If they did not know of this want of power, they must be taken to have known it.

Therefore the maxim, "*In pari delicto potior est conditio defenditis*," applies.

The corporate charter is a public enactment, always open for inspection, and a party dealing with this creature of law is charged with knowledge of the contents of its charter, and cannot be heard to say that its powers were unknown.

Alexander v. Cauldwell, 83 N. Y., 480.

Davis v. Old Colony R. R., 131 Mass., 258.

Mr. Justice Gray, speaking for the court in this case, said:

"Every person who enters into a contract with a corporation is bound at his peril to take notice of the legal limits of its capacity, especially where, as in this Commonwealth, all acts of incorporation are deemed public acts, and every corporation organized under the general laws is required to file in the office of the Secretary of the Commonwealth a certificate showing the purpose for which the corporation is constituted."

Citing:

Whittenton Mills v. Upton, 10 Gray, 582, 598.

Richardson v. Sibley, 11 Allen, 65, 72.

East Anglian Railways v. Eastern Counties Railway, 11 C. B., 775.

"This rule does not rest upon the ground that a charter or general incorporation law is a public statute of which all persons are deemed to have notice. It is a rule based on no technical doctrine, but upon the necessities of the case. It applies to foreign corporations (*Hoyt v. Thompson*, 19 N. Y., 208, 222; *Relfe v. Rundle*, 103 U. S., 222, 226) as well as to domestic corporations, and to corporations chartered by private acts of the legislature, as well as to those whose charters are a part of the general laws."

II Morawetz, Sec. 591.

In *Relfe v. Rundle*, *supra*, Mr. Chief Justice Waite said:

"Every corporation necessarily carries with it its charter wherever it goes, for that is the law of its existence. It may be restricted in the use of some of its powers while doing business away from its corporate home, but every person who deals with it everywhere is bound to take notice of the provisions which have been made in its charter for the management and control of its affairs both in life and after dissolution."

And it is to be remembered that the case at bar is not merely the want of power through silence of the legislature, but one where the act done was positively prohibited.

It must be remembered that prior to the signing of the contract of April 16, 1891, the Legislature of the State of New York had enacted the law approved June 7, 1890, quoted *supra*, but which did not go into effect until May 1, 1891, fifteen days after this contract had been signed. It is to be remembered, also, that the law was in effect prior to the execution of the contract by either party.

Being thus prohibited by the statute, even if we should refer alone to the Act of 1890, and executory, the case is within the well-known principle that a legal impossibility occasioned by the passage or a statute rendering the act illegal will, by the courts of this country, in furtherance of the local public policy, be a sufficient excuse for non-performance.

Bailey v. DeCrespigny, L. R. 4 Q. B., 180.

2 Shuler on Personal Property, 287.

Benjamin on Sales, 571.

Campbell on Sales, 315.

Newby v. Sharp, L. R. 8 Ch. Div., 39.

This proposition is saved by the assignments of

error numbered 7 (R. 466) and 22 (R. 470), referring to the fifth proposition of law (R. 469).

It thus appears that we have not here the simple case of want of power because we are unable to put our finger upon a legislative act authorizing the purchase of the stock, but we have a case where, by two acts of the legislatures of the state to which the corporation owes its existence, the particular act which the court is asked to enforce was prohibited.

The contract to increase the capital stock of the De La Vergne Company is ultra vires and void.

Section 3 of the articles of incorporation of the De La Vergne Company is as follows:

“The capital stock of said Company shall be three hundred fifty thousand dollars, which shall be divided into thirty-five hundred shares of one hundred dollars each.”

Where the charter has definitely fixed the capital at a certain sum, a corporation has no implied authority to alter the amount of its capital stock. Unless expressly authorized, a corporation can neither increase nor diminish the number or value of its shares.

I Morawetz on Corporations, Sec. 434.

N. Y. & New Haven R. R. Co. v. Schuyler, 34 N. Y., 30, is a case in which the right of a corporation to increase its capital by increasing the number of its shares is discussed. We quote from the opinion of the learned court:

“A corporation, with a fixed capital, divided into a fixed number of shares, can have no powers of its own volition, or by any act of its officers or agents, to enlarge its capital or increase the number of shares into which it is divided. The supreme legislative power of the state can alone confer that authority, and remove or consent to the removal of restrictions

which are part of the fundamental law of the corporate being; and hence, every attempt of the corporation to exert such power, before it is conferred by any direct and express action of its officers, is void."

In *Railway Co. v. Allerton*, 18 Wall., 235, Justice Bradley said:

"A corporation, like a partnership, is an association of natural persons who contribute a joint capital for a common purpose; and although the shares may be assigned to new individuals in perpetual succession, yet the number of shares and amount of capital cannot be increased, except in the manner expressly authorized by the charter or articles of association. . . . Changes in the purpose and object of an association, or in the extent of its constituency or membership, involving the amount of its capital stock, are necessarily fundamental in their character, and cannot, on general principles, be made without express or implied consent of its members."

Scovill v. Thayer, 105 U. S., 143, is to the same effect, and cites with approval both the Schuyler and Allerton cases.

No consent, express or implied, to increase the capital to effect this purchase was ever given by the shareholders of the De La Vergne Company.

The contention has been made that there was no agreement to increase the capital stock. In view of the fact that the contract recited that the then capital stock was \$350,000 and the stock must be increased to \$2,000,000 or a new corporation formed to comply with the contract, and in view of the fact that the capital stock was actually increased, it is not thought that this suggestion needs any attention.

III.

The petitioner was entitled in the court below to a special finding upon the issue of ultra vires raised by its sixth, seventh and eighth pleas (R. 22-24), and the court having refused to find upon this issue, the judgment is void.

It is thought that this principle is too well established to need argument. The court was silent upon many issues raised by the pleadings, and concerning which evidence was adduced, and notwithstanding the fact that he was requested to find specially upon each and every one of these issues. These refusals of the court to find upon the facts thus in issue, and concerning which testimony was adduced, were properly preserved and assigned for error in the Circuit Court of Appeals. They are not discussed at length here, as it is supposed that the principle applying to the one question upon which the judges of the Circuit Court of Appeals divided would apply to all of the other issues in the case concerning which there has been no finding. Upon the question of *ultra vires*, inasmuch as there was no finding by the trial court, and an equal division of opinion in the Court of Appeals, it appears there has been no trial whatever, and such an extraordinary situation is presented as to require the exercise of the jurisdiction of this court.

It is therefore submitted that the writ of *certiorari* should be issued as prayed for.

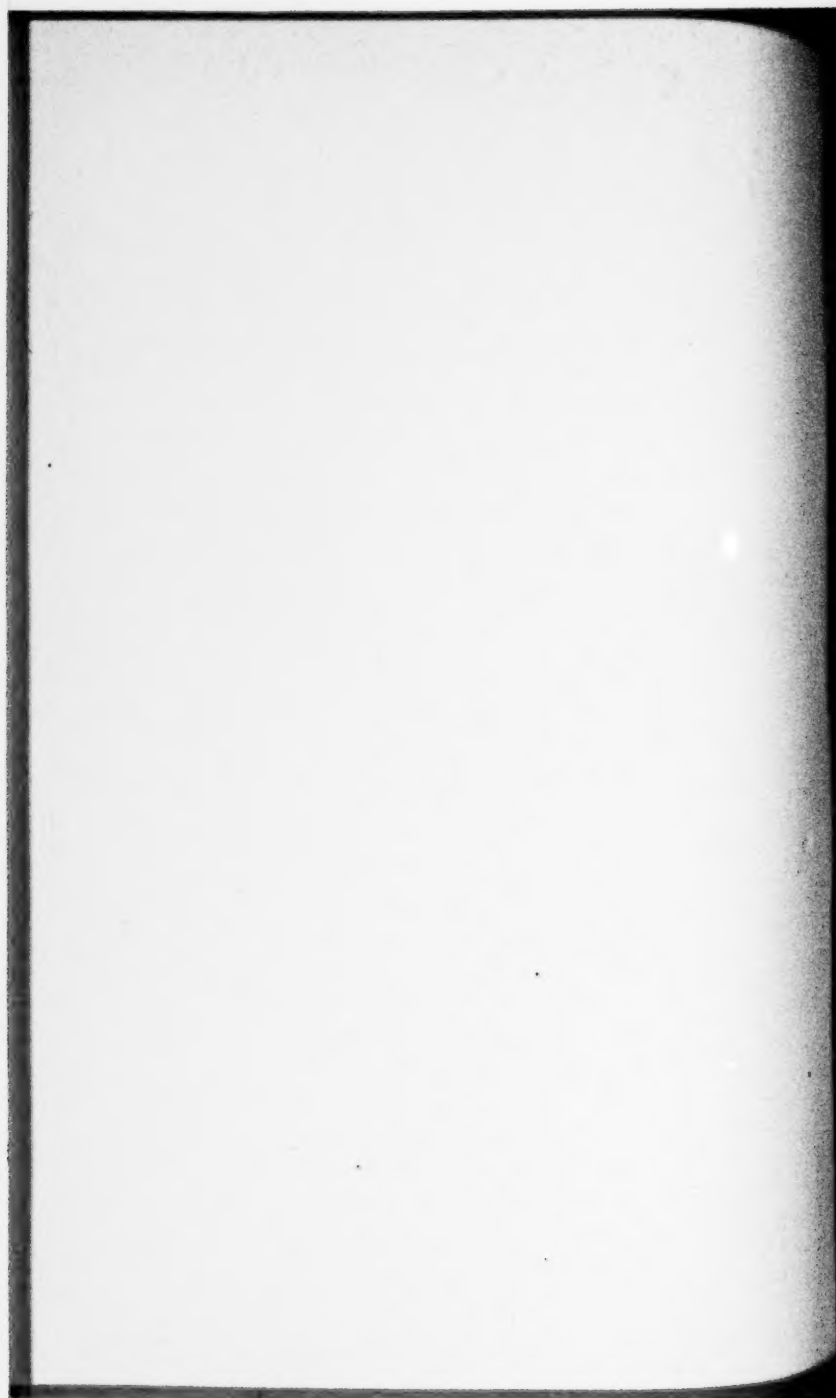
Respectfully submitted,

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CHARLES NAGLE,

Attorneys for Petitioner.



IN THE
Supreme Court of the United States.

OCTOBER TERM, A. D. 1898.

No. 240.

THE DE LA VERGNE REFRIGERATING MACHINE
COMPANY,

Petitioner,

vs.

THE GERMAN SAVINGS INSTITUTION ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR PETITIONER.

Statement of Facts.

This cause, as its title indicates, was brought to this court by *certiorari* to the United States Circuit Court of Appeals for the Eighth Circuit. The facts of the case are as follows:

In July, 1892, eight actions in foreign attachment were brought in the Circuit Court of the City of St. Louis against The De La Vergne Refrigerating Machine Company and John C. De La Vergne, the plaintiffs demand-

ing, in the aggregate, the sum of one hundred thousand dollars (\$100,000). (R. 2.) Certain personal property was levied upon (R. 11), a forthcoming bond given therefor (R. 14), and afterwards the several actions were removed to the United States Circuit Court for the Eastern Division of the Eastern District of Missouri upon the joint petition of the defendants. In that court the several actions were consolidated and submitted upon an agreed statement of facts (R. 38-51), resulting in a judgment for the defendants. Writs of error were taken to the United States Court of Appeals, and the judgment of the court below reversed and the cause remanded, with directions to grant a new trial. (36 U. S. App., 184.) In the court below, amended answers were filed (R. 18-22), much testimony taken, and the cause submitted to the court without the intervention of a jury, resulting in a judgment for \$126,849.96 (R. 31-32) in favor of the plaintiffs, from which judgment a writ of error was prosecuted by The De La Vergne Refrigerating Machine Company, one of the defendants. John C. De La Vergne, the other defendant, died on the 12th day of May, 1896, and his death was suggested to the court on the 5th day of November, A. D. 1896, at which time William C. Richardson, Public Administrator of the City of St. Louis, entered his appearance and his consent that the actions be revived against John C. De La Vergne (R. 23), and an order was entered reviving each of said actions. (R. 24.) The right of the Public Administrator thus to represent the estate of John C. De La Vergne is one of the questions to which the attention of the court will be invited, and it will be contended that the court erred in permitting him to be joined with the surviving defendant.

As appears in the declaration, the controversy in these actions arose through an alleged breach on the part of the

defendants of a contract purporting to be entered into between the plaintiffs and defendants, bearing date the 16th day of April, 1891. (R. 39-43.) As shown by this contract, the Consolidated Ice Machine Company, a corporation organized under the laws of the State of Illinois, and engaged in the manufacture of refrigerating machinery and appliances, had become insolvent, and on the 14th day of October, 1890, made an assignment for the benefit of its creditors to R. E. Jenkins, who, at the date of the contract, was engaged in winding up its affairs. The assignment, both by operation of law and in express terms, included all of the property of the insolvent company, including its good-will. The plaintiffs were stockholders in this insolvent company, and represented to John C. De La Vergne, the president of the De La Vergne Company, that the assets exceeded in value the liabilities of the company; and he, without authority, either of the stockholders or directors, on the part of the corporation of which he was president and principal stockholder, and without any action ever having been taken, either before or after the execution of this contract, ratifying or confirming it (R. 188, 203, 225), entered into an agreement by which he was to purchase the stock of the plaintiffs in this insolvent company, increase the capital stock of his own company from three hundred and fifty thousand dollars (\$350,000) to two million dollars (\$2,000,000), (this increase to be effected either under the laws of the State of New York or by the organization of a new company under the laws of the State of New Jersey) and pay (R. 41-42) the plaintiffs an amount of the capital stock of the reorganized De La Vergne Company equal to the amount of the capital stock which they then held in the insolvent company.

By the first clause of the agreement, after the recitals,

the Consolidated Ice Machine Company and its stockholders covenanted with the defendants to sell and convey unto the party of the third part (De La Vergne) all their right, title and interest in and to the assets of the Consolidated Ice Machine Company, subject to the payments of its obligations and subject to the custody thereof in the legal custodian, R. E. Jenkins, assignee as aforesaid.

By the fourth clause the shareholders agreed, within ten days from the date of the agreement, to assign to John C. De La Vergne, for the benefit of The De La Vergne Refrigerating Machine Company, all the stock of the insolvent company which had been issued which the plaintiffs owned or controlled.

By the fifth clause the stockholders in the Consolidated Ice Machine Company covenanted to accept, in lieu of stock in the reorganized De La Vergne Company, or its successor, the sum of one hundred thousand dollars (\$100,000) in cash, *at the option of John C. De La Vergne*.

To the petition setting out this agreement the defendants amended their answer before the last hearing. The answer as amended alleges that neither of the defendants ever received any of the consideration moving under the contract; that none of the assets, including the good-will of the Consolidated Company, ever came into the possession of either of the defendants, but that the same were transferred to the assignee and by him sold in the regular course of the administration of his trust to Knight and Butz, trustees, under a certain trust agreement between them and a large number of the creditors of the Consolidated Company (several of the plaintiffs, as will hereafter appear, were creditors of the Consolidated Company and were parties to this agreement); that John C. De La Vergne was never authorized by The De La Vergne Refrigerating Machine Company in its behalf to enter into

the contract upon which these actions are based; that the said company never ratified the said agreement, but rejected it; that on or about the 12th day of September, 1891, both of the defendants rejected the said contract, and that the said rejection was acquiesced in by the plaintiffs; that the plaintiffs did not perform the covenants of their agreement, but engaged in the manufacture of ice-making machinery; that they did not transfer the stock in accordance with the agreement; that the plaintiffs abandoned the contract; that the contract is *ultra vires* both as to the De La Vergne Company and the Consolidated Company; and that the contract is against public policy, and therefore void.

There was an attempt to deliver the stock, but it was practically conceded on the trial of the case, and was taken for granted by the court in its opinion (36 U. S. App., 184) that one hundred eighty-five (185) shares (stated in the opinion, 215), which were held by Lingensfelder and Ras-sieur as executors or trustees, were never legally assigned to De La Vergne, because the assignments made and delivered on April 26th, 1891, were not authorized by any order of the Probate Court.

The court, in its opinion, was very severe in its strictures upon the defendant company, assuming that it had received the assets of the Consolidated Ice Machine Company and the good-will of its business, benefited by the suppression of the competition of that company, and obtained legal control of the suppressed corporation, and after obtaining the benefits of the contract had failed and refused to pay the agreed price therefor, on the technical ground that less than one-fourth of the stock of the corporation that had conveyed away all of its assets and the good-will of its business had been imperfectly assigned. The court said that there was no evidence in the record

that had any substantial merit, and it was exceedingly difficult to see how any failure to assign this small minority of the stock could result in any injury to the defendant, and proceeded :

“ After the conveyance and covenant of April 16, 1891, was executed and delivered, the corporation was nothing but an empty shell. All its valuable rights and property had been vested in the De La Vergne Company, and the legal control of the shell itself was given to De La Vergne by the valid assignment of a majority of the stock of the corporation. These defendants cannot retain these benefits and thus make \$100,000 for themselves, and throw a loss of \$100,000 on the stockholders of this corporation, because they technically failed to perform their contract in the slight and immaterial particular that they did not legally assign a small minority of this stock.” (36 U. S. App., 195.)

“ Further, an offer to return them on September 12, 1891, if sufficient in form, would have been an idle ceremony. The defendants had undoubtedly then derived all the benefits of a performance of the contract by the Consolidated Company and its stockholders that they could ever derive. They still held the right to its assets subject to its debts, the good will of its business, and the covenant of its stockholders which suppressed its competition. No doubt, they had secured its customers and destroyed all possible competition. The return of the stockholders of the control over the empty shell of their corporation would have been a useless act. A merchant cannot, by offering to return the empty box, successfully defend an action for the purchase price of a box of goods, on the ground that the box was defective, when he has received and sold the goods.” (36 U. S. App., 196.)

In interpreting the contract the court further said :

“ The rights and benefits which the defendants were to receive from this contract were, the right of the

Consolidated Company to its assets, subject to the payment of its debts; the good will of its business, which had been established for six years; the suppression of the competition of that company and its stockholders, and the legal control of the suppressed corporation. . . . They received, retained, and had the benefit of all these rights and interests." (36 U. S. App., 194.)

When this decision was announced the appellants moved in the Court of Appeals that the order of reversal granting a new trial be modified, and that the reversal be with directions to enter judgment in favor of the several plaintiffs. This was refused, and the action stood for a new trial. Amended answers were filed. The sixth, seventh and eighth paragraphs of answer raised the issue distinctly that the contract was *ultra vires* of both the De La Vergne Refrigerating Machine Company and the Consolidated Ice Machine Company under the laws of their respective charter states. (R. 18-22.) Much testimony was taken, the most of which has no bearing upon the particular questions now presented to this court. It is sufficient to say that the inference of the Court of Appeals that the De La Vergne Company profited by the contract, and the harsh criticisms of its conduct indulged in by the court, were shown to be wholly unfounded. Mr. Knight, who represented the majority of the creditors in the assignment proceedings, testified that the De La Vergne Company never received any of the assets (R. 92); Mr. Jenkins, the assignee, made the same statement (R. 101); Mr. Bender, the manager of the De La Vergne Company, testified to the same effect (R. 179); Louis De La Vergne also (R. 188-189); Louis Barron, assistant manager, also (R. 206); also Charles H. Cone, the former secretary (R. 225). There is also the affirmative proof in the record (R. 391-392), and it was found by the court (R. 391) that on May 4, 1891,

only eighteen days after the date of the contract, and before the date fixed therein for its execution, the court entered an order to sell all the assets of the insolvent company, and they were subsequently sold to other than the defendants. (R. 392.)

Instead of being a case where the petitioner had received value, as originally supposed by the Court of Appeals, the record presents a case where a large recovery was sought for the confessedly partial delivery (36 U. S. App., 194) of stock in an insolvent corporation, forbidden by its charter to have an indebtedness beyond its capital stock, and yet shown to have been indebted to more than five times its valid stock, if we are to believe the recitals of the contract of April 16, 1891, that its stock was \$100,000. The hardship and wrong was wholly on the other side. There was not a scintilla of evidence to the contrary.

The case was again submitted to the court without the intervention of a jury, by stipulation in writing waiving a jury, and the court was requested to find the facts specially, together with conclusions of law therefrom.

The requested findings of fact submitted by the defendants are found in the Record (348-383). The propositions of law submitted by the defendant are also set out in the Record (383-384). The court found the facts specially. (R. 385-407.)

It will be noticed that the first request for finding submitted by the defendant company was as follows:

“ I.

“ The De La Vergne Refrigerating Machine Company is, and was at the time of the commencement of these actions, a corporation organized under the laws of the State of New York governing the organization of manufacturing corporations enacted on the 17th day of February, 1848, entitled ‘An Act to authorize the formation of corporations for manufac-

turing, mining, mechanical or chemical purposes,' and which laws, in and by the terms thereof, provide that 'it shall not be lawful for such company to use any of their funds in the purchase of any stock in any other corporation;' and said corporation, during the year 1890 and prior and subsequent thereto, was engaged in the business of manufacturing and selling refrigerating machinery, having its principal office and place of business at the foot of 138th Street in the City and State of New York." (R. 348-349.)

The court found upon this point:

" I.

" The De La Vergne Refrigerating Machine Company is, and was at the time of the commencement of these actions, a corporation organized under the laws of the State of New York governing the organization of manufacturing corporations enacted on the 17th day of February, 1848, entitled 'An Act to authorize the formation of corporations for manufacturing, mining, mechanical or chemical purposes,' and acts supplemental or amendatory thereof." (R. 385-386.)

The difference consists merely in the failure to find as a fact the prohibitory language quoted from the laws of the State of New York, which under some circumstances would not be material, as the court might take judicial notice thereof and administer relief accordingly. It is submitted, however, that here the strictness applying to a special verdict was requisite, and that the parties were entitled to a finding upon every material issue in the case. The defendant company asked the court to hold as a conclusion of law:

" The stock of the Consolidated Company was a part of the consideration for the promise of the De La Vergne Company to pay \$100,000 in its own stock, or in cash, and the consideration being indivisible, and being illegal so far as the stock was concerned, the contract is illegal and void." (R. 384.)

The court found nothing upon this subject, and thus it happened that the findings were silent upon issues distinctly raised by the pleadings and upon which requests as to fact and law had been clearly made. There was no trial upon these issues. The questions were properly preserved by exceptions (R. 407-409), bill of exceptions, assignment of error. (R. 428-433.)

A writ of error was taken to the Court of Appeals: there was a summons in severance (R. 434-435), where the cause was argued and submitted to Judges Thayer and Sanborn, who handed down the following *per curiam* opinion:

“PER CURIAM. The judges are divided in opinion upon the question whether or not the contract which is the basis of this action was *ultra vires* the De La Vergne Refrigerating Machine Company, and are of opinion that the other questions presented should be determined in favor of the defendants in error. The judgment below is therefore affirmed by a divided court.”

It has thus come about that, although the defendant company, by proper pleading and evidence, has sought to defend itself against this contract as prohibited by the laws of the state to which it owes its existence, yet it has been unable to obtain the opinion of any court thereon—the trial court, though making special findings of fact, choosing to remain silent upon this subject, and the Court of Appeals being equally divided thereon.

It was doubtless owing to this extraordinary condition of affairs that the two judges composing the Court of Appeals suggested that an application be made to this court for a writ of *certiorari*, that the issue might be determined and the party not mulcted in a large sum without having its principal defense passed upon by any court.

We feel that there are other manifest errors in the rec-

ord that should receive the benefit of the judgment of this court. For example, the defendant John C. De La Vergne died testate after the action of the Court of Appeals reversing the first judgment and before any evidence was taken. He was not represented in the taking of the testimony. He was represented at the trial by William C. Richardson, Public Administrator of the City of St. Louis, notwithstanding the fact that the defendant company offered to show that he had no estate in the State of Missouri (R. 36, 37), and requested the court to find his death and that his estate was represented by W. C. Richardson solely in his capacity as such public administrator. (R. 349.) The court below finds a judgment against such administrator, *notwithstanding the fact that in its finding of facts it does not find that John C. De La Vergne is dead.* (R. 385-407).

Assignment of Errors.

It is assumed that (R. 413-433) when a cause is brought to this court by *certiorari* the case stands as in the court below, and that the errors assigned upon appeal are to be deemed assigned in this court. We therefore reprint here the assignment of errors on appeal from the Circuit Court to the Court of Appeals, omitting therefrom documents set out in such assignment, which are elsewhere found in the record, thus seeking to avoid needless repetition and expense, and also omitting the assignments which we do not now care to urge upon the attention of the court.

The assignments thus insisted upon are as follows: The court erred—

- “ 1. In overruling the motion of this defendant to dismiss this cause as to William C. Richardson, public administrator, in charge of the estate of John C. De La Vergne, deceased; to which action of the Court the

said defendant then and there duly excepted." (R. 413.)

"3. And the Court erred in this: That the plaintiffs offered evidence showing the election and qualification of Wm. C. Richardson as public administrator for the city of St. Louis, Missouri, for the term of four years beginning December 12th, A. D. 1892; to which evidence so offered by the plaintiffs the De La Vergne Refrigerating Machine Co. objected on the grounds that it was immaterial and irrelevant in that the public administrator has no standing as a party in this cause; which objection was, by the court, overruled; to which ruling of the Court the defendant's counsel then and there duly excepted." (R. 427.)

"4. And the said Court upon the trial of said cause, committed error in this: That the plaintiffs offered in evidence the notice given by said William C. Richardson as public administrator, on the 13th day of March, A. D. 1896, to the effect that he had taken charge of the estate of John C. De La Vergne, deceased, which notice is in words and figures as follows, to-wit:

" ' STATE OF MISSOURI,

" ' CITY OF ST. LOUIS, ss.

" ' To the Hon. LEO RASSIEUR,

" ' Judge of the Probate Court of the City of St.

" ' Louis:

" ' Notice is hereby given to creditors and all other persons interested in the estate of John C. De La Vergne, late of the City of St. Louis, deceased, that I, the undersigned, public administrator within and for the city aforesaid, have this day taken charge of said estate for the purpose of administering the same.

" ' Given under my hand this 13th day of May, A. D. 1896.

" ' WM. C. RICHARDSON,

" ' Public Administrator.'

" The above notice bears the following endorsement on the back thereof:

" ' Recorded in book of Pub. Admr. Notices on page 418. Filed May 13th, 1896. Jos. A. Wherry, Clerk. By J. W. Gutting, D. C.'

"To which offer the De La Vergne Refrigerating Machine Co. objected on the grounds that the same was immaterial and incompetent, because the public administrator has no standing as a party in this cause, and because the statute assuming to authorize the public administrator to act as such in this cause was unconstitutional; which objection was, by the Court, overruled. To which ruling of the Court, the defendant, the De La Vergne Refrigerating Machine Co. then and there duly excepted." (R. 427-428.)

"4½. And the said Court committed error in this: That upon the trial of said cause, it was admitted upon the record by the De La Vergne Refrigerating Machine Company, that, for the purpose of releasing certain attachments made at the time these actions were instituted, John C. De La Vergne, since deceased, deposited with Adolphus Busch, a resident of the city of St. Louis and State of Missouri, certain stocks in the De La Vergne Refrigerating Machine Company belonging to said John C. De La Vergne, and that the said certificates of stock are yet held and retained by said Adolphus Busch, in St. Louis. And, in that connection, the said De La Vergne Refrigerating Machine Company offered to show by Wm. C. Richardson, public administrator, that no property of any kind or description belonging to John C. De La Vergne, deceased, had come into his possession or control; and, that the only property of John C. De La Vergne, deceased, if any, within the State of Missouri at the time of his death, or at the present time, were the certificates referred to; which certificates were endorsed by said John C. De La Vergne, in blank. To which proof so offered by the said defendant, the plaintiffs object; which objection was, by the Court, sustained; to which ruling of the Court, the said defendant then and there duly excepted." (R. 428.)

"5. That the Court committed error in finding as a fact that the plaintiffs have not, nor have any of them since entering into the contract of April 16th, 1891, abandoned the same or acquiesced in any abandonment of rescission thereof; to which finding of the Court, the defendant, the De La Vergne Re-

frigerating Machine Co. then and there duly excepted." (R. 428.)

"6. And the said Court erred in its finding of fact that the plaintiffs have not, nor have any of them, since April 16th, 1891, violated the terms or provisions of their said contract of that date, by which they bound themselves not to enter into or become connected with, the sale of refrigerating or ice-making machines; to which finding of the Court, the defendant, the De La Vergne Refrigerating Machine Co. then and there duly excepted." (R. 428-429.)

"7. And the said Court erred in failing to find as requested by the defendant, the De La Vergne Refrigerating Machine Co., in the first proposition of fact requested by it, that the laws of the State of New York, under which the defendant, the De La Vergne Refrigerating Machine Co., was incorporated, provide: 'That it shall not be lawful for such company to use any of their funds in the purchase of stock in any other corporation.' To which action of the Court refusing to so find, the said defendant then and there duly excepted." (R. 429.)

"8. And the Court erred in this: That it failed to find the second proposition of fact requested by said defendant, the De La Vergne Refrigerating Machine Co., as follows:

" 'That the president and principal stockholder of said corporation, in the years 1890 and 1891, was one John C. De La Vergne, who was made originally a defendant in these actions and was served with process and had appeared herein; that said John C. De La Vergne died testate on May 12th, 1896, in the city of New York and State of New York, where the executors appointed under his will are engaged in the administration of his estate; that said executors have never appeared in these actions, or any of them, nor has any *scire facias* or other process been issued in said actions, notifying such executors so to appear.'

" To which action of the Court in failing and refusing to find, the defendant, the De La Vergne Re-

frigerating Machine Co. then and there duly excepted." (R. 429.)

"9. And the Court committed error in this: That it failed to find, as requested by the said defendant, its third proposition of fact, as follows:

"That the said John C. De La Vergne's estate is represented in these actions by W. C. Richardson, who is the duly qualified and acting public administrator under the laws of the State of Missouri, and appears as such representative in these actions solely in his capacity as such public administrator."

"To which action of the Court in failing and refusing to so find, as requested, the said defendant then and there duly excepted." (R. 429.)

"10. And the Court erred in this: That it failed to find as requested by said defendant in its seventh proposition of fact that the said contract of April 16th, 1891, was never authorized by the directors and stockholders of the De La Vergne Refrigerating Machine Co.; to which failure and refusal of the Court to so find, the defendant then and there duly excepted." (R. 429.)

"13. And the said Court erred in this: That it refused to find the twelfth proposition of fact requested by said defendant; to which failure and refusal of the Court to so find as requested, the said defendant then and there duly excepted." (R. 430). Which said twelfth proposition of fact was as follows:

"XII. That in the meantime, John Featherstone's Sons, who had been doing all that was in their power to prevent John C. De La Vergne purchasing the claims of creditors against said insolvent, and who was represented in such efforts by Clarence A. Knight, Esq., an attorney and counsel of the bar of the State of Illinois, joined with certain other creditors in a plan to form a new corporation to purchase the assets under said order of sale, and engage in the business of manufacturing ice machinery; or, in the event that such a plan could not be carried through, then to hold such assets and dispose of the same on the most favorable terms possible; and to that end entered into a so-called trust agreement on

the 9th day of October, 1891, a copy of which trust agreement marked "Exhibit I," is filed herewith and made a part thereof. That this trust (agreeing) more than a majority of the entire indebtedness of said Consolidated Ice Machine Company, including among others, The German Savings Institution, F. Widmann, Leo Rassieur and Jacob W. Skinkle, who are plaintiffs in these consolidated causes, and at the same time Leo Rassieur was the agent and representative, in his personal or professional capacity, of all the other plaintiffs in these consolidated causes. That by the terms of this trust agreement, the same Clarence A. Knight and Otto C. Butz were constituted trustees for the creditors so signing the agreement, as under the terms and with the powers set forth in said trust agreement.' " (R. 352-353.)

"14. And the said court erred in this: That it refused to find the fifteenth proposition of fact requested by said defendant; to which failure and refusal of the Court to so find, as requested, the said defendant then and there duly excepted." (R. 430.)

"Which said fifteenth proposition of fact is as follows:

"'XV. That the creditors so purchasing the property, and their trustees, did not avail themselves of the right contained in the trust agreement to organize a new company and prosecute the business of said insolvent, but, on the contrary, seem to have abandoned that project, and on the 30th day of January, 1892, made a conditional sale of said assets to John Featherstone's Sons, by which the title to said assets, and of all ice machinery, or parts of machines, to be sold by John Featherstone's Sons until certain payments in the agreement of sale should be made, was to remain in and be done in the name of the said trustees. A copy of said agreement, marked "Exhibit K," is filed herewith and made a part thereof.' " (R. 353.) (Exhibit K—see Record, p. 380.)

"15. And the said Court erred in this: That it refused to find the sixteenth proposition of fact requested by said defendant; to which failure and refusal of the Court to so find, as requested, the said defendant then and there duly excepted." (R. 430.)

" Which said sixteenth proposition of fact is as follows:

" 'XVI. That the business was so prosecuted, under the terms of said agreement, from the date of said sale (January 30th, 1892), until the 10th day of May, 1892, when the said Featherstone's Sons availed themselves of the option contained in said agreement to make an earlier payment and receive an absolute title of the property.' " (R. 353.)

" 16. And the Court erred in this: That it refused to find the seventeenth proposition of fact requested by said defendant, as contained in its request for finding of facts, which is as follows:

" 'That neither John C. De La Vergne nor the De La Vergne Refrigerating Machine Company ever acquired or received any part of the assets of any kind or description of said Consolidated Ice Machine Company, and that the only delivery of any kind or description that was ever made by the parties of the first and second parts to the contract of April 16th, 1891, was of certain shares of stock owned by the several parties of the second part to said contract, and delivered as more particularly described in the next paragraph and the document therein referred to.' (R. 354.)

the said document being the agreed statement of facts hereinbefore set forth; to which failure and refusal of the Court to so find as requested, the said defendant then and there duly excepted." (R. 430.)

" 17. And the said Court committed error in this: That it refused to consider or pass upon the ten propositions of law requested by the said defendant, or upon any of the same; to which action of the Court in so refusing to pass upon the propositions of law requested by defendant, or upon any of the same, the defendant then and there duly excepted. The said ten propositions of law are as follows (R. 430):

" 'I.

" 'On April 16th, 1891, the date of the contract upon which these actions are brought, the Consolidated Ice Machine Company, insolvent, had no assets, legal or equitable, which it could convey, and its stockholders deriving their interest as they must

through the corporation, had no interest, legal or equitable, in the assets, including goodwill of the corporation, which was the subject of conveyance,--- nothing passed, therefore, to the defendants, or either of them, through the pretended sale of the date named, except the certificates of stock.

“ ‘ II.

“ ‘ The plaintiffs having at the date of the pretended conveyance no present title to the assets of the Consolidated Ice Machine Company, the case was within the well-known rule which makes such a sale void.

“ ‘ III.

“ ‘ The assets of the Consolidated Company, insolvent, being in the hands of an assignee under the assignment laws of the State of Illinois and in process of administration, the stock owned by the respective plaintiffs was the only thing attempted to be delivered under the contract, and was the only thing capable of passing by such contract, and must therefore be deemed the object of the contract.

“ ‘ IV.

“ ‘ The plaintiffs, as stockholders in the Consolidated Ice Machine Company, an insolvent corporation, which had made a deed of all its property to an assignee under the insolvent laws of the State of Illinois, could not thereafter, and while such assignee was engaged in the administration of the insolvent's estate, by their joint action convey or transfer any interest in the property or assets of the corporation itself, and therefore the contract must be held to have for its real purpose the transfer of the stock in the corporation which alone was capable of being the subject-matter of transfer.

“ ‘ V.

“ ‘ The stock of the Consolidated Company was a part of the consideration for the promise of the De La Vergne Company to pay \$100,000 in its own stock, or in cash, and the consideration being indivisible, and being illegal so far as the stock was concerned, the contract is illegal and void.

“ ‘ VI.

“ ‘ If the contract be considered as a sale of the assets of the Consolidated Ice Machine Company, including its good-will, for stock in the De La Vergne Refrigerating Machine Company, and not a sale of stock, then it was *ultra vires* as to the vendor company.

“ ‘ VII.

“ ‘ The contract was joint and not several, and therefore the actions are improperly brought.

“ ‘ VIII.

“ ‘ The plaintiffs abandoned the contract upon which the action is brought.

“ ‘ IX.

“ ‘ The contract for the delivery of the stock was an entire contract; such delivery was a condition precedent to any action on the part of the plaintiffs; the plaintiffs failed to make a complete delivery; and therefore this action must fail.

“ ‘ X.

“ ‘ The contract to increase the capital stock of the De La Vergne Refrigerating Machine Company was *ultra vires* and void.” (R. 431, 432.)

“ 18. And the said Court committed error in this: That it refused to define and declare the law to be, as requested by the said defendant in its first proposition of law; to which refusal of the Court, the said defendant then and there duly excepted.” (R. 432.)

“ 19. And the said Court committed error in this: That it refused to define and declare the law to be, as requested by the said defendant in its second proposition of law; to which refusal of the Court, the said defendant then and there duly excepted.” (R. 432.)

“ 20. And the said Court committed error in this: That it refused to define and declare the law to be, as requested by the said defendant in its third proposition of law; to which refusal of the

Court, the said defendant then and there duly excepted." (R. 432.)

" 21. And the said Court committed error in this: That it refused to define and declare the law to be, as requested by the said defendant in its fourth proposition of law; to which refusal of the Court, the said defendant then and there duly excepted." (R. 432.)

" 22. And the said Court committed error in this: That it refused to define and declare the law to be, as requested by the said defendant in its fifth proposition of law; to which refusal of the Court, the said defendant then and there duly excepted." (R. 432.)

" 23. And the said Court committed error in this: That it refused to define and declare the law to be, as requested by the said defendant in its sixth proposition of law; to which refusal of the Court, the said defendant then and there duly excepted." (R. 432.)

" 24. And the said Court committed error in this: That it refused to define and declare the law to be, as requested by the said defendant in its seventh proposition of law; to which refusal of the Court, the said defendant then and there duly excepted." (R. 432.)

" 25. And the said Court committed error in this: That it refused to define and declare the law to be, as requested by the said defendant in its eighth proposition of law; to which refusal of the Court, the said defendant then and there duly excepted." (R. 432.)

" 26. And the said Court committed error in this: That it refused to define and declare the law to be, as requested by the said defendant in its ninth proposition of law; to which refusal of the Court, the said defendant then and there duly excepted." (R. 432.)

" 27. And the said Court committed error in this: That it refused to define and declare the law to be, as requested by the said defendant in its tenth proposition of law; to which refusal of the Court,

the said defendant then and there duly excepted.”
(R. 432.)

“ 28. And the said Court committed error in entering judgment for the plaintiffs and against the said defendant for the sum of \$126,849.96 and costs.”
(R. 432.)

“ 31. And the said Court committed error in overruling the said defendant's motion for a new trial.”
(R. 432.)

“ 32. And the said Court committed error in rendering judgment against W. C. Richardson, public administrator, etc.” (R. 432.)

BRIEF.

I.

The assets of the Consolidated Company, insolvent, being in the hands of an assignee under the insolvent laws of Illinois and in due process of administration, the stock owned by the respective respondents was the only thing attempted to be delivered under the contract, and was the only thing capable of passing by such contract, and must, therefore, be deemed the subject of the contract.

Humphreys v. McKissok, 140 U. S., 304.

Smith v. Hurd, 12 Mete., 371, 385.

Railroad Co. v. Howard, 7 Wall., 392.

Whistler v. Foster, 14 C. B. (N. S.), 248.

Fawcett v. Osborn, 32 Ill., 411.

Burton v. Curyea, 40 Ill., 320.

Story on Sales (3rd Ed.), Secs. 188, 423.

Linn v. Thornton, 1 C. B., 379.

Huling v. Cobell, 9 W. Va., 522.

Low v. Pew, 108 Mass., 349.

That all the title of the Consolidated Ice Machine Company passed by the deed to the assignee on October 14, 1890, leaving no title, legal or equitable, in the insolvent company or its individual shareholders to which the contract of April 16, 1891, could attach.

Weber v. Mick, 121 Ill., 520, 533, 534.

Walker v. Ross, 150 Ill., 50.

Spindle v. Shreve, 111 U. S., 545.

As to the claim that the transfer of the stock was only incidental to the main purpose of the contract, which the respondents assert and one of the judges intimated was to convey the assets subject to the debts, and the stock was therefore only incidental as a means for further assurance of title, it is submitted that it was even then *a part* of the consideration for an indivisible promise, and being unlawful, the entire contract is void.

Bishop on Contracts, Sec. 74.

Widoe v. Webb, 20 Oh. St., 431.

Carleton v. Woods, 28 N. H., 290.

Peering v. Chapman, 22 Me., 488.

Ocean Ins. Co. v. Polleys, 13 Pet., 157, 164.

McBlair v. Gibbes, 17 How., 232.

Dent v. Ferguson, 132 U. S., 50, 64-66.

Armstrong v. American Ex. Bank, 133 U. S., 433, 469.

II.

The stock of the Consolidated Ice Machine Company was a part of the consideration for the promise of the De La Vergne Company to pay \$100,000 in its own stock or in cash. The contract is ultra vires of the vendee company, and therefore illegal and void.

Laws of New York, 1848, Ch. 40, Sec. 8.

Id., 1890, Ch. 564, Sec. 40.

Boone, Law of Cor., Sec. 107.

Green's Brice Ultra Vires, p. 91, note b.

1 Morawetz Private Cor., Secs. 431, 433.

People v. Chicago Gas Trust Co., 130 Ill., 268, 284.

Milbank v. N. Y., L. E. & W. R. R. Co., 64 How. Pr., 20.

Talmage v. Pell, 7 N. Y., 328.

St. L., V. & T. H. R. Co. v. T. H. & I. R. Co., 145 U. S., 393.

Central Transportation Co. v. Pullman Car Co., 139 U. S., 24.

California Nat'l Bank v. Kennedy, 167 U. S., 362.

Marble Co. v. Harvey, 92 Tenn., 116.

Union Pacific Ry. Co. v. Chicago, M. & St. P. Ry. Co., 163 U. S., 564.

Alexander v. Cauldwell, 83 N. Y., 480.

Davis v. Old Colony R. R., 131 Mass., 258.

Applying to the act of 1890, supra, enacted before the contract upon which action was brought, but going into force fifteen days after it was signed, but before the delivery upon either side under the contract.

Baily v. De Crespigny, L. R. 4, Q. B., 180.

Newby v. Sharp, L. R., 8 Ch. Div., 39.

2 Schouler Personal Prop., 287.

Benjamin on Sales, 571.

Campbell on Sales, 315.

Applying to the contract to increase the capital stock of the De La Vergne Company.

1 Morawetz on Cor., Sec. 434.

N. Y. & N. H. R. R. Co. v. Schuler, 34 N. Y., 30.

Railway Co. v. Alerton, 18 Wall., 233.

Scovill v. Thayer, 105 U. S., 143.

III.

The petitioner was entitled in the court below to a special finding upon the issue of ultra vires raised by its sixth, seventh and eighth pleas (R. 22-24), and the court having refused to find upon this issue, the judgment is void.

Cannot go to other parts of record to help out the finding.

The E. A. Packer, 140 U. S., 360, 364, 365, bottom of page.

Special findings have same effect as special verdict by jury.

Saltonstall v. Britwell, 150 U. S., 417, 419.

Special verdict is bad unless it finds all the facts in issue.

Fl. Scott v. Hickman, 112 U. S., 150, 164.

Ward v. Cochran, 150 U. S., 597, 608.

IV.

The De La Vergne Company and John C. De La Vergne having incurred a liability (if any) growing out of the same transaction, William C. Richardson, the public administrator of John C. De La Vergne, who has died, cannot be joined with the De La Vergne Company, and the action of the court below in allowing such public administrator to represent the estate of John C. De La Vergne in said action, and rendering a judgment against said De La Vergne, so represented, and this defendant, was not authorized under Sec. 956, R. S. of the United States, and to give such effect to the appointment of the public administrator by the state court is in violation of the provisions of the fifth and fourteenth amendments to the Constitution of the United States.

Section 956, R. S. U. S.

Seaman v. Slater, 18 F. R., 185.

Ballance v. Samuel, 3 Seam., 380.

Eggleston v. Buck, 31 Ill., 254.

Eich v. Severs, 73 Ill., 194.

Moore v. Rogers, 19 Ill., 346.

Powell v. Kettelle, 1 Gil., 491.

Conover v. Hill, 76 Ill., 342.

1 Chitty on Pl., 50.

The prohibitions of the constitution extend to all the instrumentalities of the state.

Chi., Burlington & Quincy R. R. Co. v. Chicago,

166 U. S., 226, 233.

The evidence offered and excluded was not a collateral

attack upon the appointment or authority of the public administrator.

Insurance Co. v. Lewis, 97 U. S., 682.

Mut. Life Ins. Co. v. Woodworth, 111 U. S., 138.

The shares of stock in the New York corporation deposited with Mr. Busch by John C. De La Vergne, deceased, did not constitute assets upon which administration by the public administrator could be predicated.

Armour Bros. Banking Co. v. St. Louis Nat'l Bank, 113 Mo., 12; and cases there cited.

V.

The respondents abandoned the contract upon which the action is brought and violated its provisions.

VI.

The contract was joint and not several, and therefore the actions are improperly brought.

Rainey v. Snizer, 28 Mo., 310.

Farni v. Tesson, 1 Black, 309.

Keightley v. Watson, 3 Ex., 716.

Parsons on Con. (8th Ed.), pp. 14-17, Williston's notes; *Id.* (6th Ed.), star page 13.

17 Am. & Eng. Enc. of Law, 562.

Foley v. Addinbrooke, 3 Gale & D., 64.

Lucas v. Beale, 20 L. J. (U. S.), ep. 134.

Lockhart v. Barnard, 14 M. & W., 674.

Byrne v. Fitzhugh, 5 Tyr., 54; 1 C. M. & R., 613.

Hatsall v. Griffith, 4 Tyr., 487.

Petrie v. Bury, 3 B. & C., 353.

Southcote v. Hoare, 3 Taunt., 87.

Guidon v. Robson, 2 Camp., 302.

ARGUMENT.

I.

The assets of the Consolidated Company, insolvent, being in the hands of an assignee under the insolvent laws of Illinois and in due process of administration, the stock owned by the respective respondents was the only thing attempted to be delivered under the contract, and was the only thing capable of passing by such contract, and must, therefore, be deemed the subject of the contract.

Since the question of *ultra vires* was raised, the claim is put forward that there was no sale of stock by the respondents and no purchase of stock by the defendants below; that the sale was of the assets of the insolvent corporation theretofore conveyed by the corporation to the assignee, subject to the payment by the assignee of the debts, and that transfer of the stock was a mere incident collateral to the main purpose of the contract. This interpretation of the contract is not sustained by its language, or the situation and conduct of the parties, and, even if the contention were admitted, for the sake of argument, it would not avail the respondents, as they would still be compelled to admit that the transfer of the stock was *a part* of the consideration.

The court will notice the attempts made to fortify the theory of the respondents by the extraordinary efforts to italicize or emphasize, with the printer's assistance, certain words and sentences of the contract of April 16, 1891. This first appeared in the printed record in the Court of Appeals, and has been properly followed by the clerk in

this court. It is sufficient to say that there is no warrant for such emphasis in the contract as actually made. How the emphasis came to be added can only be surmised. It is not thought that the natural meaning or construction of the contract can be thus changed, and this statement is made rather as an explanation of what the parties did not do than as an accusation as to what any party has done. The possibility of accident, or the presence of errors through the printer's devil, may explain this singular emphasis.

The stock was the only property owned by the respondents. It was the only subject of attempted transfer. If we admit, for the purpose of argument, that upon the payment of the debts the title would revert, the reversion would be to the corporation—not to the shareholders. If an equity existed, it belonged to the corporation and not to the shareholders. If the corporation had anything to convey, the transfer would have been in the name of the corporation, by its proper officers thereunto duly authorized. If the other party to the contract failed to pay the consideration, the corporation, not the shareholders, either jointly or severally, must bring action to obtain redress.

All of the records of the Consolidated Ice Machine Company, from its organization to the date of the trial, are in the record, and it is affirmatively shown that neither the stockholders nor the directors ever authorized the contract sued upon, or afterwards ratified or confirmed it.

The idea that all the shareholders of a corporation may, by uniting in a contract or deed, transfer the property of a corporation, without corporate action, is a mistake. If corporate property was the subject of transfer in this case, it should have been applied to the payment of the debts, which the record shows are, after a wise and economical administration of the estate, yet unpaid to an amount ex-

ceeding \$150,000. (R. 99.) Again, if corporate property was the subject of transfer, the consideration therefor could only be obtained by the plaintiffs in the several actions through the ownership of their several shares of stock, and the defendant company could acquire the property, if at all, in view of the previous conveyance to the assignee, only through the ownership of the stock. This made the stock, in any view of the case that it is possible to take, an essential element of the transfer.

It is thought that these several statements are abundantly sustained by the authorities.

The Supreme Court of Illinois, which court is, perhaps, the final judge of the extent and scope of the powers of corporations organized under the laws of that state, as was the Consolidated Ice Machine Company, and of the extent and scope of the powers of stockholders in such corporations, has held, quoting opinions of this court, that all the shareholders uniting cannot transfer the title to corporate property.

In *Sellers v. Greer*, 172 Ill., 549 (s. c., 40 L. R. A., 589), the court said:

“ It is true that Morris Sellers and Howard Greer owned all of the stock of the corporation except two shares, which belonged to their sons. But did this fact confer upon them, or either of them, the power to sell the corporate property? It is conceded that the patents and all the other property named in the contract in question belonged to the corporation Morris Sellers & Co., and the question presented is whether Morris Sellers and Howard Greer, two of the stockholders, without the consent or authority of the corporation Morris Sellers & Co., had the right to divide the corporate property between themselves, or to sell it, as was attempted to be done by the contract in question. A corporation is an artificial being created by law, clothed with certain powers. It acts through its board of directors and officers. Its prop-

erty is not subject to the control or disposition of its members or stockholders. They have no power to sell or encumber the corporate property. A reference to a few authorities will fully sustain what has been said.

"In 2 Cook, Stock & Stockholders, 3d ed. Sec. 709, it is said: 'The stockholders cannot enter into contracts with third persons. Contracts between the corporation and third persons must be entered into by the directors, and not by the stockholders. The corporation, in such matters, is represented by the former, and not by the latter. Such is one of the main objects of corporate existence. To the directors are given the management and formation of corporate contracts. The stockholders cannot, in meeting assembled, bind the corporation by their contracts in its behalf. Although one person owns a majority of the stock, or all of it, or all but two shares, he does not in consequence thereof acquire the right to act for the corporation, or as the corporation, independently of the directors. One person may own all the stock, and yet the existence, relations, and business methods of the corporation continue. A single stockholder cannot make a contract for and in the name of the corporation which shall have any binding force or validity, except by subsequent ratification or adoption in the regular manner.'

"In *Allemon v. Simmons*, 124 Ind. 199, it was attempted to hold a corporation liable on a contract made by one Crawford, who was a director and owner of five-sixths of the stock of the corporation. In disposing of the question the court said: 'It is true, Crawford was one of the directors of the company, and held a majority of the stock, but the existence of these facts conferred upon him no power to make contracts for the corporation. It could only be bound by the action of its board of directors; the board could have conferred on Crawford this power, but there was no evidence that it had done so. Crawford, as one of the directors, had no more authority or power than any other director. The board consisted of five members; and three constituted a quorum, less than three could make no binding contract for the

corporation. . . . The contract which Simmons and Ayleshire executed with Crawford was the mere personal engagement of Crawford with the said parties.'

" In *Humphreys v. McKissock*, 140 U. S., 304, 35 L. ed. 473, the validity of the action of all the stockholders of a corporation in transferring its property without corporate action arose, and in disposing of the case the court said: 'Both the commissioner and the court, in confirming his report and entering the decree mentioned, seem to have confounded the ownership of stock in a corporation with ownership of its property. But nothing is more distinct than the two rights; the ownership of one confers no ownership of the other. The property of a corporation is not subject to the control of individual members, whether acting separately or jointly. They can neither encumber nor transfer that property, nor authorize others to do so. The corporation—the artificial being created—holds the property, and alone can mortgage or transfer it; and the corporation acts only through its officers, subject to the conditions prescribed by law. In *Smith v. Hurd*, 12 Met. 385, 46 Am. Dec. 690, the relations of stockholders to the rights and property of a banking corporation are stated with his usual clearness and precision by Chief Justice Shaw, speaking for the Supreme Court of Massachusetts, and the same doctrine applies to the relations of stockholders in all business corporations. Said the Chief Justice: 'The individual members of the corporation, whether they should all join, or each act severally, have no right or power to intermeddle with the property or concerns of the bank, or call any officer, agent, or servant to account, or discharge them from any liability. Should all the stockholders join in a power of attorney to any one, he could not take possession of any real or personal estate, any security or chose in action; could not collect a debt, or discharge a claim, or release damage arising from any default, simply because they are not the legal owners of the property, and damage done to such property is not an injury to them. Their rights and their powers are limited and well defined.'

" In this court, in *Hopkins v. Roseclare Lead Co.* 72 Ill. 373, the right of a stockholder of a corporation to transfer certain leases belonging to the corporation arose, and in disposing of the question the court said (p. 379): ' It is insisted that La Grave had no power to make the sale of the leases, to transfer the control of the suit, or to sell the 20 acres of land, as they were all owned by the company. He was but a stockholder, and as such had no power to make the sale. He, although owning the majority of the stock, could not act for the company unless specially authorized. He could, no doubt, control the action of the company by the election of its officers, but still the company could only act through its officers or by expressly delegating power to others, whether a stockholder or other persons.' See also *England v. Dearborn*, 141 Mass. 590; *Newton Mfg. Co. v. White*, 42 Ga. 148; *Russell v. M'Lellan*, 14 Pick. 63.

" From what has been said it is apparent that Morris Sellers, although he owned one-half of the capital stock of the corporation, had no right to sell the corporate property, and any contract he may have made would not be obligatory on the corporation. The corporation, Morris Sellers & Co., the owner of the letters patent and other property described in the contract, was not made a party to the bill, and no decree could have been obtained against it if it had been made a party, for the reason it never executed the contract. Nor did it ratify the contract after it was made, but, on the other hand, expressly refused to do so on application of Greer to its board of directors. The bill prayed that Sellers might be compelled to convey the letters patent named in the contract to Greer. He had no title, and hence could not make a conveyance, and any decree that might have been rendered would have been nugatory. In a bill for specific performance, the contract must be of such a character that the court is able to make an efficient decree and enforce it when made. 3 Pom. Eq. Jur. Sec. 1405."

As has been noted, and as is affirmatively shown in the record, neither the stockholders nor the directors author-

ized the transfer of the assets or equity therein, if such a thing existed, to John C. De La Vergne or the De La Vergne Refrigerating Machine Company. The officers had been directed to assign all the property of the corporation, including its good-will, to Robert E. Jenkins, as assignee, under the insolvent laws of the State of Illinois, and had done so. (R. 173-174.) To claim that having made the assignment by deed, after the assignee had entered into possession and was engaged in the administration of the estate, the corporation had any property to dispose of for the benefit of its shareholders and leave its creditors unpaid, is in the highest degree absurd. To assert that the shareholders may use the name of the corporation under such circumstances, and secure to themselves, and not for the corporation, one hundred thousand dollars, while leaving creditors of the corporation to the extent of one hundred and fifty thousand dollars unpaid, seems equally absurd; and to add to these propositions the further one that these shareholders did not sell any stock (although shares of stock were the only things which they attempted to deliver), but sold the property of the corporation, and are nevertheless entitled to recover the consideration promised, not in the name nor in the interest of the corporation, but in the several names and interest of the shareholders and in the proportion of such holdings, by separate actions, is to disregard such fundamental principles of legal rights and remedies that we are unable to understand how one of the learned judges below reached his conclusions as to the right of recovery.

"Nemo dat quod non habet." This maxim expresses the principle that one who has no title cannot confer a title as expressed by Willis, J., in *Whistler v. Foster*, 14 C. B. (N. S.), 248.

The idea has been reiterated in the form: "No one can

sell a right when he himself has none to sell;" and it has been declared that this proposition is so self-evident that argument cannot elucidate or strengthen it.

14 Cent. Law J., 146.

"The general rule of law, sanctioned by common sense, is that no man can, by his sale transfer to another the right of ownership in a thing wherein he himself has not the right of property."

Fawcett v. Osborn, 32 Ill., 411.

Barton v. Curyea, 40 Ill., 320.

"The general rule is, that the subject of the sale must belong to the vendor, and that he can sell no more than the interest, which he legally possesses."

Story on Sales (3rd Ed.), Sec. 188.

"Again, if the vendor wholly fails to make a title to the vendee in an executory contract, the vendee may rescind the contract."

Story on Sales (3rd Ed.), Sec. 423.

Tindal, C. J., in delivering the opinion of the court in *Linn v. Thornton*, 1 C. B., 379, said:

"It is not a question whether a deed might not have been so framed as to have given the defendant a power of seizing the future personal goods of the plaintiff, as they should be acquired by him, and brought on the premises, in satisfaction of the debt, but the question arises before us on a plea which puts in issue the *property* in the goods, and nothing else; and it amounts to this, whether by law a deed of bargain and sale of goods can *pass the property* in goods which are not in existence, or, at all events, which *are not belonging to the grantor at the time of executing the deed*." Held, in the negative.

In *Huling v. Cobell*, 9 W. Va., 522, it appeared that an agricultural society assigned for the benefit of its creditors the proceeds of a fair about to take place on its grounds. It was held that such an assignment was void as against the lien of an execution issuing before the payment of the pro-

ceeds to the creditors. Mr. Justice Green, in his opinion, discusses the general subject, and says the rule is *that a sale of property in which the vendor has no present interest is void.*

“It is an elementary principle of the law of sales, that a man cannot grant personal property in which he has no interest or title. To be able to sell property, he must have a vested right in it at the time of the sale.”

Low v. Pew, 108 Mass., 349.

In *McGoon v. Ankeny*, 11 Ill., 558, it was held to be law that the real owner of personal property cannot sell his right or title in it to another while it is in the actual or adverse possession of one who claims title to it.

“Hence, the general rule is stated to be, that a purchaser of property takes only such title as his seller has, and is authorized to transfer; that he acquires precisely the interest which his seller owns, and no other or greater.”

Barnard v. Campbell, 55 N. Y., 460.

If, after the payment of all debts, there should remain in the hands of the assignee any surplus of the proceeds of sales and collections, such surplus belongs to the assignor. But this right of the assignor to the surplus does not exist until all debts are paid. When they are paid, it is called into existence.

Burrill on Assignments, 712.

Buller v. Thompson, 4 Abb. N. C., 290.

Briggs v. Davis, 21 N. Y., 574.

Sandmeyer v. Dakota F. & M. Co. (S. Dak.), 50 N. W., 353.

Before debts are paid this right is uncertain, indefinite, a mere possibility. It cannot be determined until debts are paid, and until that time it is not known whether there will be a surplus or a deficit; no doubt this right to the

surplus, if any, is a valuable right, but it is held adversely. An assignment is made for the benefit of creditors, and until they are paid everything of value is vested in the assignee in trust for them. Such indefinite right as this resulting trust in favor of the assignor is not subject to sale by shareholders. It belonged to the assignor, which, in the present case, is the Consolidated Company.

The Illinois statutes respecting assignments, in so far as it provides for a discontinuance of proceedings, is as follows, viz.:

“All proceedings under the Act of which this is amendatory, may be discontinued upon the assent, in writing, of *such debtor*, and a majority of his creditors in number and amount; and in such cases, all parties shall be remitted to the same rights and duties existing at the date of the assignment, except so far as such estate shall have already been administered and disposed of; and the court shall have power to make all needful orders to carry the foregoing provision into effect.”

Revised Statutes (Ill., 1897), “Assignments,” Section 15.

Nothing could be done under this statute except by aid of the debtor, the Consolidated Company. The assent requisite is that of the debtor and a majority of the creditors in number and amount.

The De La Vergne Company did not by the contract become the debtor, for it expressly refused to assume liability for debts of the Consolidated Company. (Sixth article of contract, R. 42.) It had bargained for the stock of the company, and through this stock, and only through this stock, could it secure the assent in writing of the debtor.

So the contract, having in view the fact that the assent of the debtor is necessary to a discontinuance of the assignment proceedings, provides in its fourth clause that the stock shall be assigned as prescribed, “for the purpose

of placing the said party of the third part (the De La Vergne) *in complete control* of the assets of the party of the first part, subject to the legal rights of said assignee and the creditors of said party of the first part."

The stock was necessary not only to "complete control," but it was necessary to any control whatever.

Conceding that the Consolidated Company was an empty shell, in the sense that it was insolvent, and did not contemplate a resumption of business, the fact remains that the assets which had belonged to it could be reached only through it, and it could be reached only through its stock.

The stock of the Consolidated Company was then the vital element of the consideration to the De La Vergne Company, even though the value of this stock was to be realized through the acquisition by the De La Vergne of the former assets of the Consolidated Company.

Assume that the contract contained no provision for a sale of stock, and leave the contract one in form and in fact as the respondents say it is in essence, one for the sale of the former assets of the Consolidated, subject to the rights of the assignee and the creditors, and what would the petitioners receive by the contract?

The right to discontinue the assignment, a majority of the creditors in number and amount consenting, the only right of any kind in respect to its assets remaining to the Consolidated Company after the assignment, was not conveyed by the contract and could not be so conveyed.

No court would at the suit of the De La Vergne Company compel it to assent. The matter was one between it as a debtor and its creditors.

It seems clear, therefore, from the law of Illinois, and from the language of the contract, that this possibility of discontinuing the assignment by composition or other ar-

rangement with creditors was the one thing of possible value connected with the assets of the insolvent company. This and the corporate existence might be utilized for some purpose, but, and this is true as to both of them, *only through the stock*.

The conclusion is irresistible that the stock was a part of the consideration.

On the 1st day of December, 1891, Mr. Jenkins, as assignee of the Consolidated Company, sold to John Featherstone's Sons the good-will, machinery, patterns, etc. (R. 85.)

The bills and accounts receivable were collected by the assignee and by Knight and Butz, and distributed by them among the creditors.

There is, therefore, nothing that the petitioners received unless it be the shares of stock. It has been shown that these shares were not evidence of any present interest in property.

But let us assume that stock ownership in a corporation which has executed an absolute assignment under the insolvent law by which all its property and every *legal and equitable interest therein* is vested in the assignee means the same thing as stock ownership in a solvent running corporation. What is the situation then?

The certificates of stock were evidence of the ownership of a distributive share in the surplus after debts are paid.

"A share of the capital stock merely gives the right to partake, according to the amount put into the fund, of the surplus profits of the corporation, and ultimately on the dissolution of it, of so much of the fund thus created as remains unimpaired and is not liable for debts of the corporation."

Thompson, Commentaries on Law of Corporations,
Sec. 1071.

This is a fundamental principle. It is not necessary to cite further authorities.

The assets lacked \$150,000 of being sufficient to pay the debts of the Consolidated Company. (R. 99.) What is the value of a distributive share in a deficiency of \$150,000?

It is idle to talk of the shares in the Consolidated Company being evidence of a distributive share in anything of value, at the time of the contract.

If the corporation was not insolvent, it was a fraud to assign.

Gardner v. Commercial National Bank, 95 Ill., 298.

But this assumption cannot be made; the title to all the assets passed to the assignee absolutely. Distributive ownership in the company is then impossible. The only thing of value that possibly did not pass to the assignee is the franchise, the right to be a corporation.

But all the title of the Consolidated Ice Machine Company passed by the deed of the assignee on October 14, 1890, leaving no title, legal or equitable, in the insolvent company or its individual shareholders, to which the contract of April 16, 1891, could attach.

By the agreed statement of facts, as well as by the express terms of the deed of assignment, there passed to the assignee all the property of the Consolidated Ice Machine Company wherever situated, including the patent rights, outstanding accounts "and the good-will of its business." (R. 174.) This good-will was subsequently advertised for sale by the assignee, under the order of the court, together with \$100,000 of the capital stock of the company not embraced in the sale to De La Vergne. (R. 138-139.) The assets and good-will were subsequently sold, likewise under the order of the court, to Clarence A. Knight and

Otto C. Butz, as trustees, for \$309,000 of the claims against the estate, including a portion of the respondent's herein. (R. 144, 146.) Knight and Butz afterwards, under order of court, sold the assets so acquired, including the good-will, to John Featherstone's Sons; and subsequently, by formal deed, conveyances were made by these respective parties. (R. 82, 85.)

It is thus clearly shown by the record that the assumption of the learned court deciding this case (36 U. S., 184), that the De La Vergne Company acquired the good-will or any portion of the assets of this company at any time, is wholly erroneous, as by undisputed evidence in the case (R. 99) there remains \$150,000 of the indebtedness of the company yet unpaid after the estate is fully administered.

In the absence of these express provisions of the deed of assignment and orders of court, and conveyances made in pursuance thereof, such an assignment, under the statute of the State of Illinois regulating assignments by insolvent debtors, left no title, legal or equitable, in the insolvent Consolidated Company which was the subject of conveyance. Being an Illinois corporation, assigning under the laws of the State of Illinois, the effect of the assignment has, of course, to be determined by the decisions of the highest court of that state.

In *Weber v. Mick*, 131 Ill., 520, 533, 534, the court said that the

"assignment is an absolute appropriation of the property to the payment of the debts," passing both legal and equitable title to the property "absolutely beyond the control of the assignor. . . . "Such assignments have always been understood to be instruments voluntarily executed by a failing debtor by which he assigns to some third person, as assignee or trustee, the whole, or sometimes the bulk, of his prop-

erty, to be by such trustee distributed among the assignor's creditors, in satisfaction of their demands."

In *Burrill on Assignments*, 10, it is said:

"An assignment is likewise an absolute conveyance by which both legal and equitable estate is divested out of the grantor, but the title vested in the assignee is subject to the uses and trusts in favor of the creditors, and upon their satisfaction a trust results in favor of the assignor in the residue of the unappropriated property or its proceeds."

This court, in passing upon the effect of an assignment of an insolvent debtor under the Illinois law, in *Spindle v. Shreve*, 111 U. S., 545, said:

"The Court of Appeals of Kentucky, in *Knefler v. Shreve*, 78 Kentucky, 297, had before it the very question as to the construction of this deed, and decided that all the estate and interests in property, which, at its date, the grantor held, which he could alien, and which was liable at law or in equity for the payment of his debts, passed by its terms; and in that decision we concur."

In *Walker v. Ross*, 150 Ill., 56, the court said:

"These cases further hold that there must be an absolute transfer of the whole interest of the assignor, legal and equitable, in the property assigned in trust for the benefit of creditors."

In *Stoddard v. Gilbert*, 163 Ill., 131, 135, there was an attempt to convey property while it was yet in the hands of the assignee, and it was held that the agreement could only become operative upon the discontinuance of the proceedings.

By these decisions it is established that there was no property right of any nature or description whatsoever remaining in Consolidated Ice Machine Company on April 16th, 1891, that could be made the subject of conveyance or transfer by that company. As has been said, all prop-

erty rights of the insolvent corporation had vested in its assignee. Any other decision would be monstrous, as it would enable shareholders to protect their interests without paying their creditors.

It thus appears that the only property or property right that the parties of the first and second part to the contract of April 16th, 1891, could convey were their individual shares in the capital stock of the corporation; and certainly their ownership of these shares is the only right possessed by them and which they could convey, which would justify an action by them against the petitioner or its president. This seems to make it unnecessary to consider the argument that was addressed to the Circuit Court of Appeals, and which seems to have impressed one of the judges, that the transfer of the stock was only incidental to the contract, and therefore the defense of *ultra vires* could not wholly avoid it. In adopting this proposition the learned judge overlooked a distinction which he had himself previously drawn in the case of the *Illinois Trust & Savings Bank v. Arkansas City*, 40 U. S. App., 257, 274, where he said:

“It is that when a part of a divisible contract is *ultra vires*, but neither *malum in se* nor *malum prohibitum*, the remainder may be enforced, unless it appears from a consideration of the whole contract that it would not have been made independently of the part which is void. *Oregon Steam Navigation Company v. Winsor*, 20 Wall., 64, 70; *Reagan v. Farmers' Loan and Trust Company*, 154 U. S., 362; 395; *Western Union Telegraph Co. v. Burlington & Southwestern Ry. Co.*, 11 Fed. Rep., 1, 4, and cases cited in note at page 12; *Saginaw Gas-Light Co. v. City of Saginaw*, 28 Fed. Rep., 529, 540.”

In the case at bar the transfer of the stock was a part of the consideration. The contract was indivisible in this respect, and the only attempted performance was that of a

partial delivery of the stock. There was no attempt to deliver anything else. The promise to issue a like amount of stock of the De La Vergne Company, or, at the option of Mr. John C. De La Vergne, to pay \$100,000 in money—an option which he never exercised—was only to become binding upon the delivery of \$100,000 of the stock of the insolvent company, and was a promise to the shareholders as such. The delivery and payment were to be made to the individual shareholders, in proportion to their respective holdings. It was not, therefore, using the language of the learned court in the former opinion, in which he is sustained by authority, “a divisible contract . . . neither *malum in se* nor *malum prohibitum*,” but it was an indivisible contract, *malum prohibitum* by two express enactments of the laws of the State of New York governing the rights of the De La Vergne Company, as will appear in the discussion of the next proposition.

Mr. Bishop, in his work on Contracts, Section 74, thus states the rule:

“Where the consideration for an indivisible promise is *in part* something done in violation of law, and in remainder some lawful thing, the promise cannot find support on the lawful part without resting also on the unlawful, and the whole will be void. But if there are two promises, the one founded on the unobjectionable in the consideration and the other on the evil, the former will be sustained and the latter will fail.”

This statement of the law does not require argument or elaboration in this court.

The rule is succinctly stated in *Miller v. Ammon*, 145 U. S., 421, 426, as follows:

“The general rule of law is, that a contract made in violation of a statute is void; and when a plaintiff cannot establish his cause of action without relying

upon an illegal contract, he cannot recover," citing cases.

II.

The stock of the Consolidated Ice Machine Company was a part of the consideration for the promise of the De La Vergne Company to pay \$100,000 in its own stock or in cash; the contract is ultra vires of the vendee company, and therefore illegal and void.

A corporation has such powers as are given it by its charter, and such implied powers as are necessary to carry out the corporate purpose.

This principle is well settled. In *Thomas v. Railroad Co.*, 101 U. S., 71, Mr. Justice Miller, speaking for this court, said:

"We take the general doctrine to be in this country, though there may be exceptional cases and some authority to the contrary, that the powers of corporations organized under legislative statutes are such, and such only, as those statutes confer. Conceding the rule applicable to all statutes, that what is fairly implied is as much granted as what is expressed, it remains that the charter of a corporation is the measure of its powers, and that the enumeration of these powers implies the exclusion of all others."

Dartmouth College Case, 4 Wheat., 518, 636.

Perrine v. Chesapeake, etc., Canal Co., 9 How., 172, at 184.

Metropolitan Bank v. Godfrey, 23 Ill., 531.

Caldwell v. City of Alton, 33 Ill., 417.

1 Morawetz Corporations, Sec. 316.

Taylor on Corporations, Sec. 120.

Bell, C. J., in *Downing v. Mt. Washington Road Co.*, 40 N. H., 230, said:

“Corporations are creatures of the legislature, having no other powers than such as are given to them by their charters, or such as are incidental, or necessary to carry into effect the purposes for which they were established.”

It is not, nor can it be, claimed that the charter under which the De La Vergne Company assumed to act gave it the power to purchase stock in another corporation.

It needs no argument to show that the purchase of stock in another corporation is not necessary to carry into effect the purposes of incorporation.

It matters not what the general rule may be, as such companies as the De La Vergne are prohibited from using funds to purchase stock in another corporation. Sec. 8, Chapter 40, Laws of 1848, of the State of New York, provides:

“It shall not be lawful for such company to use any of their funds in the purchase of any stock in any other corporation.”

It is established that The De La Vergne Refrigerating Machine Company was organized under this act and the amendments thereto. (R. 280.) The law of New York continued to prohibit investments by one manufacturing company in the stock of another until the enactment of Chapter 564, N. Y. Session Laws of 1890, approved June 7, 1890, and going into effect May 1, 1891. Section 40 of said chapter provides that:

“Any domestic corporation, transacting business in this state, and also in other states or foreign countries, may invest the funds in the stocks, bonds, or securities of other corporations owning lands in this state or such states, if dividends have been paid on such stocks continuously for three years immediately before such

loans are made, or if the interest on such bonds or securities is not in default, and such stocks, bonds and securities shall be continuously of a market value 20% greater than the amount loaned or continued thereon; . . . no corporation shall use any of its funds in the purchase of any stock of its own or any other corporation, unless the same shall have been *bona fide* pledged, hypothecated, or transferred to it, by way of security for, or in satisfaction or part satisfaction of, a debt previously contracted in the course of its business, or shall be purchased by it at sales upon judgments, orders, or decrees which shall be obtained for such debts or in the prosecution thereof."

It affirmatively appears in the record, by a full copy of all directors' meetings of the Consolidated Ice Machine Company, as well as by testimony of witnesses, that the Consolidated Ice Machine Company never paid a dividend on its stock during its existence; and there is nothing to dispute the inference arising from the fact that its capital stock was \$200,000, of which \$100,000 was unpaid, except the sum of \$10,000, and that its indebtedness was \$550,000, which upon the administration of the assets has left \$150,000 wholly unpaid—that \$100,000 of the stock of the Consolidated Company never was continuously of a market value twenty per cent. greater than the price which it is alleged Mr. De La Vergne had, at his option, agreed to pay therefor.

The stock of the Consolidated Company was part of the consideration to the De La Vergne Company. This question has been adjudicated by the Circuit Court of Appeals as between these parties. (36 U. S. App., 184, 187.)

That was one of the questions in controversy on the first trial. Whether it was a *legal* consideration was a question not suggested.

In the statement of the case, in the first paragraph of the

opinion, Judge Sanborn says the suit is by the German Savings Institution—

“for that portion of the purchase price of the assets, good-will, and *capital stock* of the Consolidated Ice Machine Company, a corporation, which the defendants in error promised to pay it,” etc.

The court held, as matter of law, that the Consolidated Company stock was part of the consideration, and they say that if the small minority of stock not transferred was of any value,

“the defendants may undoubtedly show that fact under proper pleadings, and offset the damage they have sustained by the failure to assign it, against the \$100,000 they promised to pay for the substantial benefits of this contract.”

In the absence of express statutory authority, a corporation cannot purchase stock of another corporation.

Boone on the Law of Corporations, Sec. 107, thus states the law:

“Without a power specifically granted, or necessarily implied, a corporation cannot become a stockholder in another corporation, and especially where the object is to obtain the control or affect the management of the latter.”

In Green's Brice's *Ultra Vires*, p. 91, note *b*, it is said:

“In the United States a corporation cannot become a stockholder in another corporation unless by power specifically granted by its charter, or necessarily implied in it.”

Morawetz on Private Corporations, Secs. 431, 433, says:

“A corporation has no implied right to purchase shares in another company for the purpose of controlling its management. . . . A corporation cannot, in the absence of express statutory authority, become an incorporator by subscribing for shares in a

new corporation, nor can it do this indirectly through persons acting as its agents or tools."

In *People v. Chicago Gas Trust Co.*, 130 Ill., 268, at 284 the court said:

"It has been held in many cases that in the United States corporations cannot purchase, or hold, or deal in the stocks of other corporations, unless expressly authorized to do so by law, and that one corporation cannot become the owner of any portion of the capital stock of another corporation unless authority to become such is clearly conferred by statute."

The following is taken from the syllabus of the case:

"The gas trust company mentioned was incorporated under the general law for two purposes, as expressed in the articles of association: First, for the purpose of erecting and operating gas works for the manufacture and sale of gas in Chicago and other places in this state; and second, 'to purchase and hold or sell the capital stock, or purchase, or lease, or operate the property, plant, good-will, rights and franchises of any gas works or gas company or companies, or any electric company or companies, in Chicago or elsewhere, etc.

"The company sought to exercise the powers claimed under the second clause only, and for that purpose bought a majority of the shares of all the stock of all the gas companies in Chicago, being four in number, whereby it might have control of all the gas companies in the city, and thus destroy competition and monopolize the gas business. *Held*, that the corporation so formed was not for a lawful purpose, and that all acts done by it toward the accomplishment of such object were illegal and void."

At various times during the years 1873 and 1874 the Erie Railway Company purchased more than one-half of all capital stock of the Buffalo, New York & Erie Railroad Company, and paid for the same out of its corporate funds. *Held*, that such purchase was not necessary in the exercise

of any of its corporate powers; that is was unauthorized and in violation of the statute, and was consequently *ultra vires*.

Milbank v. New York, Lake Erie & Western R. Co., 64 Howard's Practice Reports, 20.

In *Talmage v. Pell*, 7 N. Y., 328, it was held that a corporation has no power to purchase the stock of other corporations for the purpose of selling them for profit, or as a means of raising money, except when such stocks have been received in good faith as security for a loan made or a debt due such corporation, or when taken in payment of such loan or debt.

In the case of *The Mechanics' Mutual Savings Bank v. Meridan Agency Company*, 24 Conn., 159, it was held that a company organized to do a general insurance agency, commission and brokerage business has no power to subscribe to the stock of a savings bank and building association.

In the case of *The Central Railroad Company v. The Pennsylvania Railroad Company*, 31 N. J. Eq., 475, it was held that a corporation cannot, in its own name, nor in the name of individuals, subscribe for stock or be a corporation under the general railroad law.

Kennedy v. Railroad, 62 N. H., 537.

Hotel Co. v. Schram, 6 Wash., 134.

Franklin Co. v. Lewiston Inst. for Savings, 68 Me., 46.

It is thus established by the great weight of authority that an agreement by one corporation to purchase stock in another is *ultra vires*. An *ultra vires* contract is illegal and void.

St. Louis, Vandalia & Terre Haute R. Co. v. Terre Haute & Indianapolis R. Co., 145 U. S., 393.

It is shown by the report of the De La Vergne case, in 36 U. S. App., p. 190, that it was mistakenly considered in the nature of a suit for specific performance. No action can be brought to compel specific performance of an *ultra vires* contract, which is illegal and void.

Bank of Michigan v. Niles, Walker's Chan. R. (Mich.), 99.

In the case of *The Central Transportation Co. v. Pullman Car Co.*, 139 U. S., 24, the plaintiff company had leased and transferred all of its property of every kind to the defendant company, which was engaged in a similar and competitive business. The lessee company undertook to pay all of the debts of the lessor company, and to pay to it annually the sum of \$264,000 for a term of ninety-nine years. The suit was for a part of the installment for the last year before suit. The defense of *ultra vires* was interposed and sustained, the court holding that the sale was unauthorized and in excess of the power of the selling company. It was argued for plaintiff, as in this case, that, even if the contract was void, because *ultra vires* and against public policy, yet that, having been fully executed on the part of the plaintiff, and the benefit of it received by the defendant for the period covered by the declaration, the defendant was estopped to set up the invalidity of the contract as a defense to an action to recover the compensation agreed on for that period.

After reviewing the prior decisions upon this branch of the case, the court said (p. 59):

"The view which this court has taken of the question presented by this branch of the case, and the only view which appears to us consistent with legal principles, is as follows: A contract of a corporation which is *ultra vires* in the proper sense, that is to say, outside the object of its creation as defined in

the law of its organization, and therefore beyond the powers conferred upon it by the Legislature—is *not voidable only but wholly void, and of no legal effect*. The objection to the contract is not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it. When a corporation is acting within general scope of the powers conferred upon it by the Legislature, the corporation, as well as the persons contracting with it, may be estopped to deny that it has complied with the legal formalities which are prerequisites to its existence or to its action, because such requisites might in fact have been complied with. But when the contract is beyond the powers conferred upon it by existing laws, neither the corporation nor the other party to the contract can be estopped, by assenting to it or by acting upon it, to show that it was prohibited by those laws.

“ A contract *ultra vires*, being unlawful and void, not because it is in itself immoral, but because the corporation, by the law of its creation, is incapable of making it, the Courts, while refusing to maintain any action upon the unlawful contract, have always striven to do justice between the parties, so far as it could be done consistently with adherence to law, by permitting property or money, parted with on the faith of the unlawful contract, to be recovered back, or compensation to be made for it. In such case, however, *the action is not maintained upon the unlawful contract, nor according to its terms*, but on an implied contract of the defendant to return, or, failing to do that, to make compensation for property or money which it has no right to retain. To maintain such an action is not to affirm, but to disaffirm, the unlawful contract.”

The case at bar is not to recover the value of the stock delivered, but to enforce the unlawful sale of stock against

the corporation prohibited by its charter from making the purchase.

In the case of *California National Bank v. Kennedy*, 167 U. S., 362, which reasserts the principles laid down in *Central Transportation Co. v. Pullman Car Co.*, the court said:

"The lease sued on having been executed by the defendant contrary to the express prohibition of the statute, which peremptorily forbade the corporation to transact any business unless to perfect its organization, and thus denied it the capacity to enter into any contract whatever, except in perfecting its organization, *the lease is void*, and cannot be made good by estoppel, and will not support an action to recover anything beyond the value of what the defendant has actually received and enjoyed."

In *Marble Company v. Harvey*, 92 Tenn., 116, the Marble Company, an Ohio corporation, contracted with Harvey to take shares in a Tennessee corporation doing a like business; the consideration was \$6,000, the defendant assuming and agreeing to stand one-half the loss accruing to plaintiff in consequence of suits pending against the Tennessee corporation. The relief sought was to compel defendant to pay one-half the loss accruing. The defense of *ultra vires* was set up. It was held that "the suit is clearly in furtherance of the original, unlawful and void contract. That the contract has been executed by the plaintiff does not make it lawful or entitle it to an enforcement of it." It is in no sense a suit in disaffirmance.

This Tennessee case is so conclusive in its argument, and so exactly parallel in its facts to the case at bar, that any short citation does not enable the court to appreciate its importance in the present discussion. It shows that the contract in this case was executory, and that, to enable the respondents to recover, it is necessary for the court to

give effect to a corporate act which is absolutely forbidden by the express terms of statutes regulating the powers of both the vendor and vendee companies.

It is urged by the respondents in this case, as in the *Central Transportation Co. v. Pullman Car Co.*, that, even if the contract was void, because *ultra vires* and against public policy, yet that, having been fully executed on the part of the respondents, and the benefit of it received by the petitioner, the petitioner was estopped to set up the invalidity of the contract as a defense to an action to recover the consideration agreed on.

This court, however, in the *Central Transportation Co.* case would not allow that defense to prevail, holding the contract *ultra vires* and void, and therefore no performance on either side could give the contract any validity, or be the foundation of any action upon it.

In *California Nat'l Bank v. Kennedy*, 167 U. S., 362, the bank became a stockholder in a savings bank, and while such stockholder received dividends on the stock. Both banks failed, and an attempt was made to charge the bank as a stockholder in the savings bank. By virtue of the federal statutes, under which the bank was organized, it had no power to become a stockholder in another corporation. The Superior Court of California adjudged the national bank to be the holder of shares in the savings bank and responsible to the creditors of the savings bank in proportion to its holdings. An appeal was taken to the Supreme Court of the state, which affirmed the judgment. On a writ of error to this court the judgment was reversed.

The court, speaking by Mr. Justice White, held that

“a national bank has no power to deal in stocks, and cannot, therefore, acquire the stock of another corporation, except as incidental to its power to lend money on personal security.”

"The purchase by a national bank of the stock of another corporation, not as incidental to the banking business, *being void cannot be ratified, and therefore the bank is not estopped to deny its liabilities, for the debts of such corporation, though it has received dividends on the stock.*"

The court deals with the question of estoppel in the following manner:

"The claim that the bank, in consequence of the receipt by it of dividends of the stock of the savings bank, is estopped from questioning its ownership and consequent liability, is but a reiteration of the contention that the acquiring of stock by the bank under the circumstances disclosed was not void, but merely voidable. It would be a contradiction in terms to assert that there was a total want of power by any act to assume the liability, and yet to say that by a particular act the liability resulted. The transaction, being absolutely void, could not be confirmed or ratified."

and ends the opinion by quoting from the language of Mr. Chief Justice Fuller in *Union Pacific Ry. Co. v. Chicago, M. & St. P. Ry. Co.*, 163 U. S., 564:

"A contract made by a corporation beyond the scope of its powers, express or implied, on a proper construction of its charter, cannot be enforced or rendered enforceable, by the application of the doctrine of estoppel."

This, we submit, is a conclusive answer to respondents' contention.

Granting, for the sake of argument, that the contract was entirely executed on the part of the Consolidated Company and that the De La Vergne Company got everything it bargained for (which we deny), it is not estopped from setting up the defense of *ultra vires*.

The agreement to purchase stock in the Consolidated Company was illegal and void. It was an agreement which

the De La Vergne Company was not only not authorized to make, but was prohibited from making. This action was originally brought to enforce the payment of the purchase price, and is clearly in furtherance of the original, void contract, as these respondents could only owe for the stock or its value. It is in no sense an action in disaffirmance. A court of law will not aid in enforcing a contract which one of the parties had no authority to make, and which was illegal and void.

The only course the respondents could have pursued was to disaffirm the contract and sue the petitioner on the implied contract to return; or, failing to do that, to make compensation for property which it had no right to retain.

The record clearly shows that the petitioner received nothing which it could retain; there is not a scintilla of testimony in conflict with that statement.

John C. De La Vergne and the Consolidated Company and stockholders thereof knew, at the time the contract was made, that the De La Vergne Company had not the power to enter into the agreement by which they attempted to bind it. If they did not know of this want of power, they must be taken to have known it.

“A contract made by a corporation beyond the scope of its powers, express or implied, on a proper construction of its charter, cannot be enforced, or rendered enforceable, by the application of the doctrine of estoppel.”

This, we submit, is a conclusive answer to the plaintiff's contention.

In *McCormick v. Market National Bank*, 162 Ill., 100, 109, the court said:

“Nor is the company, because it represented itself as fully authorized to make this lease, now estopped from insisting upon its want of power. On the con-

trary, it is its duty to cease to act in defiance of the law, and it has no right by silence to suffer itself to be driven into a continuance of what was always wrong."

This case was affirmed by this court in

Mc Cormick v. Market National Bank, 165 U. S., 538.

See, also,

Hamor v. Taylor-Rice Engineering Co., 84 F. R., 392, 397.

Durkee v. People, 53 Ill. App., 396, 405, 406.

Same case, Supreme Court, 155 Ill., 354.

In the latter case the court said:

"A contract in conflict with constitutional provisions and the statute under which a corporation is organized cannot be ratified or made valid by subsequent acts, and that there is no estoppel against showing that the contract is invalid as in violation of the statute or against public policy."

In *Relfe v. Rundle*, *supra*, Mr. Chief Justice Waite said:

"Every corporation necessarily carries with it its charter wherever it goes, for that is the law of its existence. It may be restricted in the use of some of its powers while doing business away from its corporate home, but every person who deals with it everywhere is bound to take notice of the provisions which have been made in its charter for the management and control of its affairs both in life and after dissolution."

And it is to be remembered that the case at bar is not merely the want of power through silence of the legislature, but one where the act done was positively prohibited.

It must be remembered that prior to the signing of the contract of April 16, 1891, the Legislature of the State of New York had enacted the law approved June 7, 1890, quoted *supra*, but which did not go into effect until May

1, 1891, fifteen days after this contract had been signed. It is to be remembered, also, that the law was in effect prior to the execution of the contract by either party.

Being thus prohibited by the statute, even if we should refer alone to the Act of 1890, and executory, the case is within the well-known principle that a legal impossibility occasioned by the passage of a statute rendering the act illegal will, by the courts of this country, in furtherance of the local public policy, be a sufficient excuse for non-performance.

Bailey v. DeCrespigny, L. R. 4 Q. B., 180.

2 Schouler on Personal Property, 287.

Benjamin on Sales, 571.

Campbell on Sales, 315.

Newby v. Sharp, L. R. 8 Ch. Div., 39.

This proposition is saved by the assignments of error numbered 7 (R. 429) and 22 (R. 432), referring to the fifth proposition of law (R. 431).

It thus appears that we have not here the simple case of want of power because we are unable to put our finger upon a legislative act authorizing the purchase of the stock, but we have a case where, by two acts of the legislatures of the state to which the corporation owes its existence, the particular act which the court is asked to enforce was prohibited.

The contract to increase the capital stock of the De La Vergne Company is ultra vires and void.

Section 3 of the articles of incorporation of the De La Vergne Company is as follows:

“The capital stock of said Company shall be three hundred fifty thousand dollars, which shall be divided into thirty-five hundred shares of one hundred dollars each.”

Where the charter has definitely fixed the capital at a

certain sum, a corporation has no implied authority to alter the amount of its capital stock. Unless expressly authorized, a corporation can neither increase nor diminish the number or value of its shares.

1 Morawetz on Corporations, Sec. 434.

N. Y. & New Haven R. R. Co. v. Schuyler, 34 N. Y., 30, is a case in which the right of a corporation to increase its capital by increasing the number of its shares is discussed. We quote from the opinion of the learned court:

"A corporation, with a fixed capital, divided into a fixed number of shares, can have no powers of its own volition, or by any act of its officers or agents, to enlarge its capital or increase the number of shares into which it is divided. The supreme legislative power of the state can alone confer that authority, and remove or consent to the removal of restrictions which are part of the fundamental law of the corporate being; and hence, every attempt of the corporation to exert such power, before it is conferred by any direct and express action of its officers, is void."

In *Railway Co. v. Allerton*, 18 Wall., 235, Justice Bradley said:

"A corporation, like a partnership, is an association of natural persons who contribute a joint capital for a common purpose; and although the shares may be assigned to new individuals in perpetual succession, yet the number of shares and amount of capital cannot be increased, except in the manner expressly authorized by the charter or articles of association. . . . Changes in the purpose and object of an association, or in the extent of its constituency or membership, involving the amount of its capital stock, are necessarily fundamental in their character, and cannot, on general principles, be made without express or implied consent of its members."

Scovill v. Thayer, 105 U. S., 143, is to the same effect,

and cites with approval both the Schuyler and Allerton cases.

No consent, express or implied, to increase the capital to effect this purchase was ever given by the shareholders of the De La Vergne Company.

The contention has been made that there was no agreement to increase the capital stock. In view of the fact that the contract recited that the then capital stock was \$350,000 and the stock must be increased to \$2,000,000 or a new corporation formed to comply with the contract, it is not thought that this suggestion needs any attention.

III.

The petitioner was entitled in the court below to a special finding upon the issue of ultra vires raised by its sixth, seventh and eighth pleas (R. 22-24), and the court having refused to find upon this issue, the judgment is void.

It is thought that this principle is too well established to need argument. The court was silent upon many issues raised by the pleadings, and concerning which evidence was adduced, and notwithstanding the fact that he was requested to find specially upon each and every one of these issues. These refusals of the court to find upon the facts thus in issue, and concerning which testimony was adduced, were properly preserved and assigned for error in the Circuit Court of Appeals. They are not discussed at length here, as it is supposed that the principle applying to the one question upon which the judges of the Circuit Court of Appeals divided would apply to all of the other issues in the case concerning which there has been no finding. Upon the question of *ultra vires*, inasmuch as there

was no finding by the trial court, and an equal division of opinion in the Court of Appeals, it appears there has been no trial whatever, and such an extraordinary situation was presented as to require the exercise of the jurisdiction of this court, and was, as we assume, one of the reasons why this court granted the writ of *certiorari*. This would make necessary the reversal of the court below in any event. We have, however, reserved the discussion of this and the following points with the hope that this court would not feel called upon to award a new trial, but finding the contract of such a nature as not to be capable of enforcement against the De La Vergne Company, would order the reversal, with directions to enter a judgment against the respondents and in favor of that company. The want of power being evident, the act attempted (we will say for the sake of argument, though the record shows that it was never authorized by the stockholders or directors of the De La Vergne Company) being prohibited by the laws of its charter state, such direction would seem to be the necessary result of a reversal, and such a course would save the expense of another trial and writs of error to the trial court.

And this leads to the discussion of the invalidity of the judgment against the De La Vergne estate, as represented by the public administrator—the question involved in our next proposition.

IV.

The De La Vergne Company and John C. De La Vergne having incurred a liability (if any) growing out of the same transaction, William C. Richardson, the public administrator of John C. De La Vergne, who has died, cannot be joined with the De La Vergne Company, and the action of the court below in allowing such public administrator to represent the estate of John C. De La Vergne in said action, and rendering a judgment against said De La Vergne, so represented, and this defendant, was not authorized under Sec. 956, R. S. of the United States, and to give such effect to the appointment of the public administrator by the state court is in violation of the provisions of the fifth and fourteenth amendments to the Constitution of the United States.

The record shows that Mr. John C. De La Vergne died testate, on the 12th day of May, 1896. He was a citizen of the State of New York, and his executors proceeded to administer the estate in the City and State of New York. (R. 36-37.) They were not notified or summoned in any way, by *scire facias* or otherwise, to make them parties to this litigation, and counsel stated upon the record (R. 63) that they were not authorized to represent the executors, and that their appearance was to be limited to an appearance for the De La Vergne Refrigerating Machine Company. (R. 58.) In this state of affairs, instead of discontinuing the action as against John C. De La Vergne, as is contemplated by Section 956, R. S. of the United States,

and proceeding against the company alone, it was assumed by the plaintiffs below (respondents here) that they could have the public administrator of the City of St. Louis substituted as a defendant and representative of John C. De La Vergne, and he was so substituted by order of the court below. To this action the appellant, De La Vergne Company, objected, and moved to have the action dismissed as to said administrator, supporting the motion by an affidavit giving the above facts, and also stating that the said John C. De La Vergne had no estate at the time of his death, of any kind or description whatsoever, in the State of Missouri, which could come to the hands of the said administrator, as such. These facts were not disputed. The court overruled the motion to dismiss the action as to De La Vergne through his representative, Richardson; to which an exception was preserved. (R. 37.)

Over like objections, and to the same end, the court admitted in evidence the bond of Richardson as public administrator, and a notice which he had published as such public administrator to the effect that he had taken charge of the estate of John C. De La Vergne. (R. 55, 59.) This notice shows that this administrator was an officer of the same court of which one of the respondents was at the time judge. (R. 55.)

To the same end, the defendants below (petitioners here) objected on the ground that it was not competent to thus appoint a representative of a deceased defendant, and that as such defendant Richardson had no status as a party to the case, and that if such a proceeding were authorized by any statute of the State of Missouri, such statute would be unconstitutional. This action of the court constitutes the third and fourth assignments of error in this court. (R. 465.)

On the part of petitioners it is contended that it is not

competent for a state, either through its legislature or its courts, upon the death of a defendant in the federal court, or for that matter in a state court, although the latter is a moot question here, to authorize a citizen of such state, whether a public official or otherwise, to appear and represent the deceased person, and proceed to a judgment which binds his personal estate in any other court of the United States, under the constitutional provision that "full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state;" and the general rule with reference to the conclusiveness of judgments recovered in other jurisdictions.

Section 956 of the Revised Statutes of the United States is as follows:

"If there are two or more plaintiffs or defendants in a suit where the cause of action survives to the surviving plaintiff or against the surviving defendant, and one or more of them dies, the writ or action shall not be thereby abated; but, such death being suggested upon the record, the action shall proceed at the suit of the surviving plaintiff against the surviving defendant."

On a reasonable and proper construction of this section of the statute, we submit it was error to join the public administrator as a party defendant to this action.

The circumstances of this case exactly fit the statute. There were two defendants, the De La Vergne Company and John C. De La Vergne. No argument is necessary to show that the action survives against the surviving defendant. John C. De La Vergne has died. The statute says, "the writ or action shall not be thereby abated," but that, the death of John C. De La Vergne being suggested, the action shall proceed against the surviving defendant, the De La Vergne Company.

This statute says nothing about joining the representa-

tive of the deceased party, but distinctly says that the action shall proceed against the *surviving* defendant.

But aside from the statutory provision governing the case, and considering the question in view of the defendant's liability, we are forced to the same conclusion.

In *Seaman v. Slater*, 18 F. R., 485, it is held that:

"Where several persons have incurred a liability arising from the same transaction, *the representative of one of them who has died cannot, in an action at law, be joined with the survivors.* If the liability is merely joint, the survivors only remain liable at law; if several, as well as joint, the action, if prosecuted against both the representatives of the deceased person and the survivor, must proceed against them separately."

Judge Wallace, in stating the opinion of the court, gives the reason for this rule in the following language:

"Whether the deceased defendant was a partner or a tenant in common with the surviving defendant, the action cannot be revived against the representatives of the defendant so as to proceed against them and the survivor jointly, because there cannot be a judgment against one *de bonis testatoris* and against the other *de bonis propriis.*"

No matter what view is taken of the liability of the defendants, whether joint, or joint and several, the representatives of the deceased cannot be joined with the survivor in the same action.

In *Ballance v. Samuel*, 3 Scam., 380, it is held that:

"Where one of the joint makers of a contract dies, his executor or administrator is discharged at law; and an action can be maintained only against the survivor."

In *Eggleston v. Buck*, 31 Ill., 254, it is held that:

"Where a contract is several, or joint and several, the administrator of a deceased obligor may be sued

at law in a separate action. But the administrator cannot, in such case, be sued jointly with the survivor. And should they be thus improperly sued jointly, the misjoinder would be had on error."

In *Eich v. Severs*, 73 Ill., 194, it is held that:

"In a suit upon a promissory note, against several makers, where the principal dies and his death is suggested, it is improper to make his administrator a co-defendant with the others."

To the same effect are:

Moore v. Rogers, 19 Ill., 346.

Powell v. Kettelle, 1 Gil., 491.

Conover v. Hill, 76 Ill., 342.

The clearest and most emphatic statement of the law on this point is to be found in 1 Chitty on Pleading, 50, and is as follows:

"In the case of a joint contract, if one of the parties die, his executor or administrator is *at law* discharged from liability, and the survivor alone can be sued; and if the executor be sued, he may either plead the survivorship in bar, or give it in evidence under the general issue; but in equity the executor of the deceased party is liable, unless in some instances of a surety. If the contract were several, or joint and several, the executor of the deceased may be sued at law in a separate action; but he cannot be sued jointly with the survivor, because one is to be charged *de bonis testatoris*, and the other *de bonis propriis*."

But aside from these considerations, which show that the same judgment should not be entered against the petitioner and the estate of Mr. John C. De La Vergne, there is a consideration growing out of the provisions of the constitution of the United States, as found in the fifth and fourteenth amendments. Such action on the part of the legislature or of a court is an action depriving persons in-

terested in De La Vergne's estate of life, liberty or property, without due process of law. It is true that this action is by a federal court, and thus within the letter of the prohibition of the fifth amendment, and within the fourteenth also, if the action of the court below rests upon a statute of the State of Missouri or the appointment by the state court.

In *Chicago, Burlington & Quincy R. R. Co. v. City of Chicago*, 166 U. S., 226, 233, the court said, speaking of the fourteenth amendment:

"But it must be observed that the prohibitions of the amendment refer to all the instrumentalities of the State, to its legislative, executive and judicial authorities; and therefore whoever, by virtue of public position under a State government, deprives another of any right protected by that amendment against deprivation by the State, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State. This must be so, or, as we have often said, the constitutional prohibition has no meaning, and the State has clothed one of its agents with the power to annul or evade it." (Citing authorities.)

The court holding:

"That the prohibitions of the Fourteenth Amendment extended to all acts of the State, whether through its legislative, its executive, or its judicial authorities; and consequently it was held that a judgment of the highest court of a State, by which a purchaser at an administration sale, under an order of a probate court, of land belonging to a living person who had not been notified of the proceedings, deprived him of his property without due process of law contrary to the Fourteenth Amendment."

The court below assumed that the action of the probate court in appointing the public administrator, and the

notice of the public administrator that he had entered upon the discharge of his duties and taken possession of the estate of John C. De La Vergne, was conclusive proof that John C. De La Vergne died in the State of Missouri, had an estate there to be administered, and that assets had come to the hands of the public administrator, and that these questions were not controvertible ones. (R. 347, 348.) This was giving to the action of the state court an effect which brings it within the prohibitions of the amendment referred to; and as we have shown, under any proper construction of Section 956 of the Revised Statutes, such a judgment as was entered in this case is erroneous and void.

It may be said that this is not available error in behalf of the De La Vergne Company, petitioner. To this we answer, that if, as is contended, the contract upon which a liability is sought to be enforced was entered into by John C. De La Vergne without any authority whatever from the stockholders or directors of the De La Vergne Company, and there can be no dispute that such was the fact, there would unquestionably be a liability on the part of De La Vergne in his lifetime, and his estate after his death, to the De La Vergne Company, for any injury resulting therefrom. The De La Vergne Company is thus vitally interested in having a judgment, if any can be recovered in such form that it has validity against De La Vergne's estate.

The action of the court in holding that the appointment of the administrator, and his notice that he had entered upon the discharge of the administration of the estate of John C. De La Vergne, deceased, precluded any proof that John C. De La Vergne was a citizen and resident of the State of New York, died in the City of New York, testate, and that his executors there were administering his estate,

and that he left no property in the State of Missouri, is in direct conflict with the principles announced in the decision of this court in *Insurance Co. v. Lewis*, 97 U. S., 682. The court there holds that such evidence as was offered in the case at bar and excluded by the court is not a collateral attack upon the appointment or authority of the public administrator. It was there held, as it was here contended in behalf of the appellants, that:

“Recognizing his right to perform all the functions which, by the laws of Missouri, pertain to that office, the company, in view of the facts we have stated, simply denies that Lewis had any authority, under the statutes of that State or by virtue of his appointment as such administrator, to take charge of the particular estate in question, or assert any claim arising out of the alleged contract of insurance. If the mere presumption by Lewis of authority to that extent was sufficient *prima facie* to maintain this action—a proposition which it is unnecessary to discuss—the conceded and established facts show an entire absence of any such authority, and prove that the company was not bound to litigate with him, in any court whatever, its liability upon the policy sued on. The company only sought to restrict him to the discharge of his legitimate duties, and prevent him from intermeddling in matters which did not concern him as public administrator.

“The defense, if true, did not question his capacity as such administrator to perform any of the duties imposed upon him by law.”

The inference, also, from the case of *New England Mutual Life Ins. Co. v. Woodworth*, 111 U. S., 138, holding:

“Letters of administration which state that the intestate had, at the time of death, personal property in the state, are sufficient evidence of the authority of the administrator to sue in that state, *in the absence of proof that there was no such property.*”

In the case at bar the petitioners offered to show by William C. Richardson, the public administrator, "that no property of any kind or description belonging to John C. De La Vergne's estate, had come into his possession or control; and that the only property of John C. De La Vergne, deceased, within the State of Missouri, at the time of his death," or at the time of the trial, were certain certificates of stock in the name of and belonging to John C. De La Vergne, deposited by him with Adolphus Busch, a resident of the City of St. Louis and State of Missouri, to indemnify him as surety upon the bond given to release the attachments made at the time these actions were commenced. (R. 428.) This offer was excluded, the court holding that the appointment could not be collaterally attacked and that the presumption of appointment and possession of property was not a rebuttable one.

It is submitted that the authorities last cited are conclusive that this action of the court was erroneous.

It may be said that the presence of certificates of stock in The De La Vergne Refrigerating Machine Company, belonging to John C. De La Vergne in his lifetime and to his estate upon his death, subject to the terms of the deposit with Mr. Busch, established the fact that the deceased had property in the State of Missouri upon which the public administrator was authorized to administer, and which justified his appearance in this case in person and by separate attorney, and his practical consent to a judgment in favor of one of the plaintiffs in the case, who was, as has been said, at the same time a judge of the court in which he was public administrator, performing statutory duties, we will assume, so as to avoid criticism.

This contention, however, has been conclusively answered by the Supreme Court of Missouri in the case of *Armour Bros Banking Co. v. St. Louis National Bank*,

113 Mo., 12, where the court, repeating the language in *Foster v. Potter*, 37 Mo., 526, held:

"The property interest of the shareholder is an intangible and indivisible thing and cannot be actually seized by the officer. . . . such property is neither a specific chattel nor a debt, but a mere chose in action."

The court, in the latter case, continuing:

"But be that right what it may, certificates of stock are not the stock itself—they are but evidences of the stock; and the stock itself cannot be attached by a levy of attachment on the certificate. As was well said by the Supreme Court of Pennsylvania, 'Stock cannot be attached by attaching the certificate any more than lands situated in another state can be attached by an attachment in Pennsylvania served on the title deeds to such lands.' Cook on Corporations, sec. 485. 'Shares of stock in a corporation are personal property whose location is in that state where the corporation is created. . . . Considered as property separated from its owner, stock is in existence only in the state of the corporation.' Cook on Corporations, sec. 485.

"In *Young v. Iron Co.*, 2 S. W. Rep., 202, the supreme court of Tennessee said: 'If the presence within the state of the stock certificates was essential in determining the *situs* of the stock, then it is admitted that the certificates were, both in contemplation of law as well as in fact, with the person of Powell, who was a non-resident. But these stock certificates were the mere evidences of the ownership of the shares—*indicia* of his interest in the earnings and profits of the company. Their seizure by an execution or by an attachment would not be a seizure or levy upon the stock itself without more. Notice to the corporation, or to the officer having charge of the books of the company, is essential in case of execution. . . . Hence the locality of the paper certificates, or their actual seizure, is unimportant."

This covers the assignments of error numbered 1, 3, 4, 4½ and 9. (R. 413, 427, 428, 429.)

V.**The respondents abandoned the contract upon which the action is brought and violated its provisions.**

The trust agreement by which the creditors, including four of the respondents, appointed Messrs. Knight & Butz their trustees and agents (R. 62), with full power to form another corporation to take over the assets of the insolvent corporation and continue the manufacture of ice machinery (R. 63), is wholly inconsistent with the assertion of liability on the part of the petitioners, and shows an acquiescence in the refusal to go on, embodied in Mr. Fitch's letter of September 12, 1891. They had not delivered the stock; the Attorney General had attacked their corporate existence owing to the very contract upon which these actions are founded (R. 122, 125), and on the ground that the corporation had never been legally organized (R. 127); they had incurred indebtedness to the extent of \$450,000 beyond their capital stock, as in effect they now claim they had only \$100,000 capital stock and were liable as directors for this excess under the Illinois statute; and they were alleged to be liable as partners because of this defective organization. It was desirable to secure exemption from these liabilities. The creditors were the ones to grant such exemption. The petitioners had not succeeded in purchasing any claims and had received nothing. The respondent's interests lay in another direction—\$450,000 as against \$100,000—hence they joined the scheme to buy the creditors' claims under an agreement by which they both secured exemption and contemplated going on with the business. The covenant not to do so was not obligatory upon them, as the other party

had released them prior to this date by disaffirming the contract.

It is not important whether the parties did form a corporation or not. Such a contract evinces the intention as clearly as if it had been followed by corporate organization.

But, in fact, the parties did carry on the business from January 30, 1892, until May 10, 1892, as is shown by the conditional sale contract between Knight and Butz, trustees, and John Featherstone's Sons (R. 82), and the testimony of Mr. Thomas (R. 105-108), supplemented as it is by that of Koenigsberg. (R. 259.)

This constitutes abandonment, as is submitted, not as to the four respondents only, but as to all of them, as it affirmatively appears that Judge Rassieur had full powers.

It is submitted that these considerations sustain the proposition that the court erred in finding that none of the respondents had violated the terms or provisions of the contract by which they bound themselves not to enter in or become connected with the sale of refrigerating or ice-making machines, which finding is covered by the fifth and sixth assignments of error. (R. 428-429.)

VI.

The contract was joint and not several, and therefore the actions are improperly brought.

It has been held in Missouri, following the common-law rule, that the non-joinder of all joint promisees is fatal to the plaintiff's case at any time because there is no cause for action in any one promisee.

Rainey v. Snizer, 28 Mo., 310.

And in the courts of the United States it is recognized

as an elementary principle of the common law, that when a contract is jointly, payable to several, a defendant can take advantage of the non-joinder of all the obligees by demurrer or in arrest of judgment under the general issue.

The principle of the common law, though technical, cannot be disregarded by the federal courts without the aid of a statute.

Farni v. Tesson, 1 Black, 309.

The plaintiff clearly proceeds on the supposition that the covenant to issue the stock is a separate covenant with each stockholder. This supposition is erroneous for the following reasons: The fundamental principle in regard to the construction of contracts as joint or several is that the language of the contract must govern.

Farni v. Tesson, *supra*.

Keightley v. Watson, 3 Ex., 716.

Parsons on Contracts, 8th Ed., pages 14 to 17, Williston's Notes.

In this contract there are two covenants to issue this stock. The covenant sued on in this case, in paragraph 4, states that the said parties of the third and fourth parts agree to issue and deliver to said parties of the second part, in the proportions aforementioned, the stock of the said party of the third part to the amount of \$100,000. The proportions aforementioned are contained in the second paragraph. In that paragraph the said parties of the third and fourth part covenant and agree to and with the said parties of the first and second parts to issue unto the said parties of the second part \$100,000 par value of stock in certain proportions. It is clear that the covenant contained in the second paragraph is a covenant with the parties of the first and second parts as joint covenantees,

although each of the stockholders has a separate interest in the amount of stock to be delivered to him. Under the authorities just given, the separate interest of each stockholder cannot make this joint covenant a separate covenant. This covenant in the second paragraph, although not the covenant sued upon, may, nevertheless, be considered in connection with the covenant in the fourth paragraph to determine the construction of the latter covenant, because the fourth paragraph refers to the second. It is true that in the fourth paragraph, where the parties of the third and fourth part agree to issue and deliver stock to the parties of the second part, no covenantee is named, so that this paragraph, standing alone, might perhaps be looked at as showing a separate covenant with each stockholder. But the second paragraph expressly states that the said parties of the second part covenant to and with said parties of the third and fourth parts to accept in lieu of the said stock the sum of \$100,000 in cash. This covenant is clearly joint. Moreover, all the covenants made by the parties of the second part are clearly joint in form. The presumption, of course, is that any promise made to two or more is made to them jointly. The only thing to oppose that presumption in this case is the existence of separate interests in the stockholders; and the language of the whole agreement seems to strengthen, rather than to overthrow, the presumption.

The rule of law applicable is thus stated in 17 Am. & Eng. Enc. of Law, 562:

“Where . . . there are a number of obligees in a joint contract, the cause of action arising therefrom is joint, and all the obligees must unite as plaintiffs, although some of the said obligees have no interest in the amount recovered, and although some

of them never executed and refuse to execute the contract."

Parsons on Contracts (6th Ed.), star page 13:

"If a contract, which is expressly and in its very terms joint and several, be made with divers persons, but for the payment of a sum, or the accruing of some other benefit, to one of them only, all must join in a suit upon that contract, because but one thing is to be done, and all have a legal interest in the performance of that thing, although but one party has a beneficial interest. . . ."

In *Foley v. Addenbrooke*, 3 Gale & Davidson, 64, the court said:

"We are of the opinion that the demise being joint and the covenants upon which the action is brought entire, and made with both the lessors, the cause of action is joint, and that both the covenantees ought to sue, though as between themselves their interests may be separate."

In *Lucas v. Beale*, 20 Law Jour. (N. S.), C. P. 134, 4 E. L. & E., 358, the plaintiff, acting on behalf of the members of an orchestra to which he himself belonged, signed a proposal "on behalf of the members of the orchestra" to continue their services, provided the defendant would guarantee certain salary due them. The defendant accepted this proposition, but failed to pay the salary due. The plaintiff alone brought an action for the whole money due to himself and the others, and stated the contract to be with himself and the others. The jury found that he acted on behalf of himself as well as the others. It was held that the contract was joint and that he could not recover.

Lockhart v. Barnard, 14 M. & W., 674, was an action of assumpsit. A hand-bill relating to a stolen parcel offered a reward to "whoever should give such information as should lead to the early apprehension of the guilty par-

ties." The information was communicated first by plaintiff to C. in conversation, afterwards to a constable by plaintiff and C. jointly. Held, that C. ought to have joined in the action for the reward.

In *Byrne v. Fitzhugh*, 5 Tyr., 54; 1 C. M. & R., 613, before Patterson, J., and Gurney, B., the agreement of defendant was that in consideration of plaintiff and B. using their endeavors to charter ships and procure passengers on board of them, and not engage with any other emigrant broker, they, the defendants, undertook to pay plaintiff and B. a commission of five per cent. on the amount of the net passage money made by the ships, one-half to be paid the plaintiff and the other half to B. *Lane v. Drinkwater* being cited, it was held that plaintiff, suing without B., should be non-suited.

In *Hatsall v. Griffith*, 4 Tyr., 487, a broker was employed to sell a ship belonging to three part owners, two of whom communicated with him. To them he paid their shares of the proceeds of the sale; but, after admitting the third part owner's share to be in his hands, refused to pay it to him without the consent of the other two. An action of assumpsit having been brought by the third part owner for the share, *held* that he was not entitled to recover.

In *Petrie v. Bury*, 3 B. & C., 353, Covenant, Demurrer, the covenant declared upon was with the plaintiff and two others, for the use of a third party. The declaration averred that the two other covenantees had never sealed the deed. It was held, notwithstanding, that all *might* sue, so all *must* sue, and that the declaration was bad.

In *Southcote v. Hoare*, 3 Taunt., 87, action upon a covenant upon an indenture of three parts. It was held, on demurrer, that a covenant with A. and B. and with

every of them is joint, though A. is a party of the first part, and B. party of the second part, to the deed.

In *Guidon v. Robson*, 2 Camp., 302, there was an action by the drawer and payee of a bill of exchange against the acceptor. The bill sued upon was drawn payable to Guidon & Hughes, under which firm the plaintiff traded. There was no one associated with him as a partner; but he had a clerk named Hughes, and Lord Ellenborough held that such clerk should have been joined.

The conclusion asserted by the proposition we are now discussing is made certainly necessary if we regard the transactions as a sale of the assets of the Consolidated Ice Machine Company, or the consideration as proceeding from that company.

If we regard it as a sale of separate shares of stock, and this were a suit in equity for specific performance, as the Circuit Court of Appeals was led to suppose, there would be much reason for construing the contract so as to give to each party plaintiff in these cases a separate cause of action.

While it is noticeable that neither of the defendants ever agreed to pay \$100,000 in lieu of the stock to be delivered, but John C. De La Vergne alone reserved the option to do so, and there is not a syllable of proof that the De La Vergne Company's stock was worth par or any price, yet the covenant to deliver and the covenant as to value (upon which the action is not founded) are covenants clearly joint in their character. As this is an action at law brought severally upon a joint covenant, it should fail.

The court was asked to declare the contract a joint one (R. 431, VII), and its refusal so to declare the law is the assignment of error numbered 24. (R. 432.)

It is insisted that the judgment of the Circuit Court was not authorized either by the facts as originally agreed upon between the parties, or as disclosed by the record upon the second trial; that the court erroneously felt itself limited by the expressions of the Circuit Court of Appeals when the cause was first before that court, and erred in all respects as is assigned upon the record; and that the Circuit Court of Appeals should have reversed said court with directions to find for the defendants, and that this court should now so act.

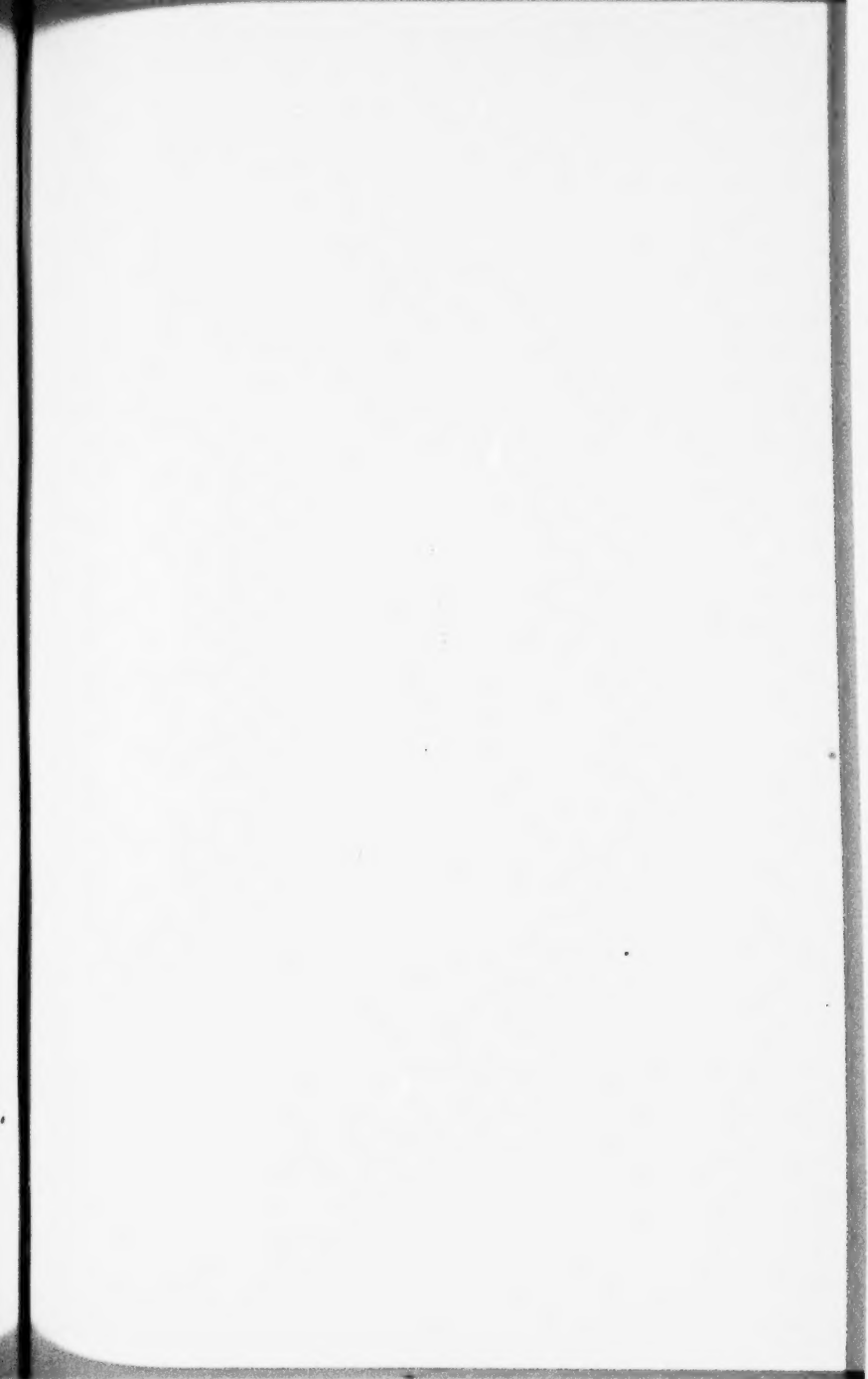
Respectfully submitted,

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Attorneys for Petitioner.





FILE
FEB 17
JAMES H. McKEE

No. 579. 240.
Brief of Smith for Respondents

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1897.
Filed Feb. 17, 1898.

In the Matter of the Application of the De La Vergne Refrigerating Machine Company for a Writ of Certiorari.

THE DE LA VERGNE REFRIGERATING
MACHINE COMPANY,

Petitioner,

vs.

GERMAN SAVINGS INSTITUTION, ET AL.,

Respondents.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE EIGHTH CIRCUIT.

STATEMENT, BRIEF AND ARGUMENT ON
BEHALF OF RESPONDENTS.

ELENEIOUS SMITH,
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BEHALF OF RESPONDENTS.

STATEMENT.

The suggestion of the Judge of the Circuit Court
of Appeals upon which petitioner claims to act was,
as we understood it, that petitioner might, if it saw

fit, apply to this Honorable Court for a writ of *certiorari*, in view of the division of the Circuit Court of Appeals on the one question of *ultra vires* in these causes.

These causes, brought in 1892, have been twice decided by the United States Circuit of Appeals for the Eighth Circuit, both times in favor of the respondents and substantially upon the same record; in the last decision the court decided every point in favor of the respondents except the single question whether or not the contract, which is the basis of these actions, is *ultra vires* The De La Vergne Refrigerating Machine Company, upon which question the two judges, who last heard the case, were divided in opinion.

Assuming that it is proper to attempt to aid this honorable court in getting the facts out of a somewhat voluminous record which bear upon the only question in this case which did not receive the unanimous concurrence of the judge of the Circuit Court and of all the judges of the Circuit Court of Appeals, and upon which this application for a writ of *certiorari* seems to be in the main based, we respectfully submit for consideration that an examination of the contract upon which these suits are based (set out *in haec verba* in the motion at page 3) will disclose the following clearly marked features or component parts thereof, viz :

(a) Date of contract and parties thereto, being The Consolidated Ice Machine Company, party of the first part; the respondents in this petition (plaintiffs who have obtained the judgments from which petitioners appealed to the Circuit Court of

Appeals), all of the stockholders of the said Consolidated Ice Machine Company, parties of the second part; the petitioner, The De La Vergne Refrigerating Machine Company, party of the third part, and John C. De La Vergne, party of the fourth part.

(b) A preamble setting forth the legal status of the party of the first part, which company had made an assignment for the benefit of its creditors; the belief that its assets, consisting in part of its good will, exceeded in value the amount of its liabilities; the desire of the party of the third part (petitioner) to acquire such rights as said parties of the *first* and second parts could assign in said assets subject to said first party's obligations; the provision of the Illinois law with reference to the right of the first party to again obtain possession of these assets; the legal status of the party of the third part, the amount of its capital stock, and the net value of its assets; and the further fact that the said party of the third part was then considering a plan of increasing its capital stock from \$350,000 to \$2,000,000, the assets being valued at \$1,400,000, of which \$1,050,000, or 300% should be issued to its stockholders as a dividend.

(c) A statement of the consideration moving the said parties in the making of the contract.

(d) First. A covenant and agreement of the *first* and second parts with the parties of the third and fourth parts to convey, and a conveyance pursuant thereto by the parties of the *first* part and the parties of the second part unto the party of the third part of all their right, title and interest in and to the

assets of said party of the first part, consisting in part of the good will, subject to its obligations and subject to the legal custody of the assignee.

(e) Second. A covenant and agreement on the part of the parties of the third and fourth parts, (petitioner company and John C. De La Vergne individually) to and with the parties of the first and second parts to issue unto the parties of the second part full paid stock in the party of the third part to the amount of \$100,000, in proportions therein set out, and which proportions the evidence in the cause proved was the exact proportions in which said second parties held stock in said party of the first part, the Consolidated Ice Machine Co.

(f) Third. A covenant and agreement on the part of the parties of the third and fourth parts that the net value of the assets of the party of the third part was \$1,400,000, not including the "*assets and rights*" purchased under the agreement under consideration, and that the stock to be issued to the parties of the second part by the De La Vergne Company should represent not less than one-fifteenth part of said assets after the addition of the Consolidated Company's rights or assets, and that no additional stock should be issued by said De La Vergne Company without receiving actual and full value for such additional stock; that the parties of the second part should have the privilege of examining the assets of said De La Vergne Company, and if such assets failed to verify the statements set forth in the preamble regarding value, that then the parties of the second part should have the right to demand that

said stock in the De La Vergne Company be made to accord with the covenant regarding its value, and that an examination of said assets, in good faith, by purchasers of at least \$100,000 of additional stock, with notice of such examination to the parties of the second part, should be conclusive on said second parties of the value of said De La Vergne Company's assets.

(g) Fourth. Agreement of the parties of the second part "for the purpose of placing the party of the third part in complete control of the assets (including good will) of the party of the third part," to assign, within ten days after date of said contract, to the party of the fourth part, for the benefit of the party of the third part, all the stock of the party of the first part which was issued and regarding which it was guaranteed that it was full paid, and an agreement of the parties of the third and fourth parts, within sixty days thereafter, to issue and deliver to said parties of the second part, in the proportions already referred to, the said stock of the third party to the amount of \$100,000.

(h) Fifth. A covenant on the part of the parties of the second part to accept, in lieu of said stock in the De La Vergne Company, the sum of \$100,000 in cash, at option of the party of the fourth part.

(i) Sixth. Expression of understanding that the party of the third part should not be held to have made itself liable for the debts of the party of the first part.

(j) Seventh. A covenant and agreement on the part of the parties of the second part with the parties

of the third and fourth parts for a period of ten years from the date of contract not to enter into the business of selling refrigerating or ice-making machines, directly or indirectly, in the United States, except in Montana, and except also in the business of the party of the third part, or of such company as becomes successor to said third party or purchaser of all its rights.

Before calling attention to specific parts of the contract, it may not be improper to suggest that since the Consolidated Ice Machine Company undertook by the contract to sell its right to re-acquire its good will and other assets, in other words, made a sale which had the legal effect of precluding it from again going into the business for which it was incorporated, it was legally necessary, and rightfully so, that all of the stockholders who were interested in the use of its capital as indicated by its charter, should join in the said conveyance and make it effective, and thus estop the stockholders from contending that the corporation exceeded its powers. Furthermore, since the contract of sale also conveyed away all of its remaining rights in its assets (namely, its so-called equity of redemption in its other assets) and reduced them to stock in the De La Vergne Company or cash at the option of John C. De La Vergne, it was deemed right and proper to make distribution at once to the stockholders of the company of such proceeds as would be realized out of its equity of redemption and which by the contract of the company could no longer be used in said corporate business.

It will be observed from an inspection of the contract :

First. That the *Consolidated Ice Machine Company*, in which was lodged the right to re-acquire the title and which had a perfect right to dispose of its said right or so-called equity of redemption in its assets, is the party of the first part, and *makes* the conveyance in the contract.

Second. That the parties of the second part, the stockholders, merely join therein to evidence their consent to a conveyance of its right to re-acquire the equity in its good will, a part of said assets, and to a conveyance of all of its rights in said assets, an unusual conveyance which might otherwise have been questioned by any one of the said stockholders.

Third. That the preamble, which undertakes to set out the existing conditions of the companies and their assets and the purpose of the agreement, clearly indicates such purpose on the part of the petitioner to have been to "acquire such rights as the said parties of the FIRST and second parts can assign in and to said assets" making no reference whatever to a purchase of the stock certificates of the said parties of the second part.

Fourth. That the paragraph of said contract beginning with the word "First" describes the right conveyed therein and simply refers to it as being "all their right, title and interest in and to the assets of the said party of the first part, etc.," and makes no mention whatever of certificates of stock.

Fifth. That the next paragraph beginning with the word "Second," provides the consideration for

the above conveyance, to-wit, \$100,000 of stock in the De La Vergne Company, but makes no mention that the said consideration is to be delivered for anything else than the interest or right in the assets transferred by the prior paragraph.

Sixth. That the following paragraph, to-wit, the "Third," shows what was added to the assets of the petitioner by the purchase contracted for by this agreement, and speaks of this addition as "the assets and rights purchased under this agreement," using the words which had theretofore been used in describing the right to the assets subject to the obligations of the party of the first part, but in no way intimating that valid certificates or shares of stock would be thereby added to such assets of the De La Vergne Company, or that they represented value.

Seventh. That the "Fourth" paragraph indicates that the transfer of the certificates of stock was to be made merely "for the purpose of placing the said party of the third part in complete control of the assets of the party of the first part, subject to the legal rights of said assignee and the creditors of said party of the first part," and leaves no room for the contention that the certificates of stock were the subject of the sale. All the assets of the Consolidated Company having been theretofore, by the preceding part of the contract, conveyed away, and provision having therein been fully made for the distribution of the proceeds to the stockholders, as per their holdings of stock, in satisfaction of their demands, as evidenced by their respective certificates of stock, there was no longer any value in said cer-

tificates as *certificates of stock*, except possibly as a muniment of title, and in order that the purchaser of the rights in the assets might be put in complete control of the same, subject to the creditors' rights, the assignment of said certificates was required to be made.

Eighth. That it may be assumed that no person would have had inserted the provision marked "Sixth" in the said contract if the same had been a contract for the purchase of certificates of stock, and not for the purchase of certain rights in assets subject to liabilities.

Ninth. That paragraph "Seventh" would not have been written so as to make the former stockholders of the Consolidated Ice Machine Co. covenant not to enter the business of selling refrigerating and ice making machinery, directly or indirectly, without noting as a further exception thereto the business of the Consolidated Company, if such corporation had been deemed an existing one, or one whose affairs had not been wound up by this contract, or one which the De La Vergne Company could have rehabilitated or given new life to.

We respectfully submit that the contract, taken as a whole, clearly demonstrates that the subject of the sale was the right to reacquire the assets, including the good will of the Consolidated Ice Machine Co., by payment of its obligations or consent of its creditors, or what may not inaptly be termed the equity of redemption in those assets, and not the certificates of stock of said Consolidated Co.

2nd. That the sale to the petitioners by the Consolidated Company of its right to reacquire its assets and good will had the effect legally of prohibiting the Consolidated Ice Machine Co. from continuing the business for which it had received corporate power.

3rd. That the legal effect of the acceptance by the Consolidated Company and its stockholders of the covenant of the third and fourth parties to pay cash or issue the stock to be received as a consideration for the equity in the assets including the good will of the Consolidated Ice Machine Co. directly to the stockholders of said Consolidated Company in the proportions in which they held stock in said Company, was a distribution of said fund to said stockholders pursuant to the principles of law underlying the creation of corporations, and left the certificates of stock of said Consolidated Ice Machine Co. without any value whatever, in fact as valueless in every way as a satisfied or discharged note of hand, or a mortgage or deed of trust which was originally given to secure such discharged or satisfied note.

4th. That the paragraph of the contract marked "Fourth," which refers to the assignment of said certificates of stock of the Consolidated Ice Machine Company by its stockholders to John C. De La Vergne for the benefit of the petitioner, on its face shows that said certificates were not to be assigned to him as subsisting certificates of stock representing value in said company (such certificates to which the doctrine of *ultra vires* invoked in this cause was

intended to be applied) but merely as further evidence of ownership of rights in the assets and because the purchaser of the right to re-acquire the assets supposed that said certificates furnished an additional muniment of the right to re-acquire the title to the assets, including the good will of the Consolidated Ice Machine Company, subject, however, to the payment of its obligations, in addition to the conveyance in the contract. That the parties so understood and substantially so expressed the object of the assignment by said paragraph seems to us to be fairly shown by the first clause thereof, which reads, "For the purpose of placing the said party of the third part in complete control of the assets of the party of the first part, subject to the legal rights of the said assignee and the creditors of the party of the first part."

5th. That the covenant of the former stockholders of the Consolidated Ice Machine Company not to enter into the business of selling refrigerating or ice-making machines, directly or indirectly, in certain parts of the United States excepting in the business of the party of the third part, or of such company as became its successor, also tends to show the winding up of the Consolidated Ice Machine Company and the substantial cancellation of its stock certificates.

Inasmuch as the petitioner, by its statement of facts, undertakes to convey the impression that these cases, as presented by the record at the last hearing thereof in the United States Circuit Court of Appeals are entirely different from the ones presented

by the record at the first hearing by said court, and inasmuch as this honorable court may deem it of essential importance in passing upon the petition at bar to determine whether or not the two records are substantially the same, we respectfully call attention to the fact that the first record merely contained as evidence the agreed statement of facts, set out in full on pages 12 to 26, inclusive, of the petition for the writ of certiorari. That the Circuit Court of Appeals, in its opinion, by a full bench, decided as follows thereon, to-wit:

Judge Sanborn delivered the opinion of the court.

“The German Savings Institution, a corporation, the plaintiff in error, brought an action against the De La Vergne Refrigerating Machine Company, a corporation, and John C. De La Vergne, the principal stockholder of that corporation, the defendants in error, for that portion of the purchase price of the assets, good will and capital stock of the Consolidated Ice Machine Company, a corporation, which the defendants in error promised to pay to it by a written agreement made on April 16, 1891. The plaintiff was a stockholder of the Consolidated Ice Machine Company, and the defendants answered that the plaintiff and his co-stockholders had failed to assign the stock of that company as they had promised to do in this agreement. The case was tried by the court upon an agreed statement of facts, and a judgment was rendered for the defendants. These were the material facts:

“The De La Vergne Refrigerating Machine Company, hereafter called the De La Vergne Company, was a corporation of the State of New York, and

"the Consolidated Ice Machine Company, hereafter
 "called the Consolidated Company, was a corpora-
 "tion of the State of Illinois. These corporations
 "were engaged in manufacturing and selling ice-
 "making machines and were rivals in that business.
 "On October 14, 1890, the Consolidated Company
 "made a general assignment for the benefit of its
 "creditors. On April 16, 1891, that company and
 "its stockholders, one of whom was the plaintiff,
 "made a bill of sale and an agreement with the De
 "La Vergne Company and De La Vergne which re-
 "cites that, 'whereas * * * the assets of
 "the said party of the first part (the Consol-
 "idated Company) in the opinion of the said
 "party of the second part (its stockholders), exceed
 "in value the liabilities thereof, and consists in part
 "of the good will of said party of the first part
 "(which good will has been established by six
 "years of successful manufacture of refrigerating
 "and ice-making machines, together with an ex-
 "penditure of the earnings from such manufacture),
 "and whereas the said party of the third part (the
 "De La Vergne Company) is willing to acquire such
 "rights as the said parties of the first and second
 "parts can assign in and to the said assets, subject
 "to the obligations of said party of the first part; * *
 "Now, therefore, in view of the premises, and for
 "and in consideration of the mutual advantages to
 "be gained by the execution of this contract,' the
 "Consolidated Company and its stockholders 'agree
 "and covenant to and with the parties of the third
 "and fourth parts (the De La Vergne Company and
 "De La Vergne) to bargain, sell and convey, and

“ by these presents do bargain, sell and convey unto
“ the said party of the third part, all their right, title
“ and interest in and to the assets of the said party
“ of the first part, subject to the payment of its obli-
“ gations;’ the De La Vergne Company and De La
“ Vergne covenanted and agreed to issue to the
“ plaintiff in error the full paid capital stock of the De
“ La Vergne Company to the amount of twenty-five
“ hundred dollars par value, to issue to its co-stock-
“ holders a proportionate amount of such stock so
“ that all the stockholders would receive in the ag-
“ gregate \$100,000 in such stock; the stockholders
“ of the Consolidated Company agreed to assign to
“ De La Vergne, within ten days from the date of
“ the agreement, all the full paid stock of the Con-
“ solidated Company, which was one thousand
“ shares, to take \$100,000 in cash in lieu of the
“ \$100,000 in stock of the De La Vergne Company;
“ and promised and agreed not to enter into the
“ business of selling ice-making machines in the
“ United States, except in the State of Montana, for
“ ten years, and the De La Vergne Company and
“ De La Vergne agreed to issue the one hundred
“ thousand dollars of capital stock in the De La
“ Vergne Company to the stockholders of the Con-
“ solidated Company within sixty days after the
“ stock of the latter company was assigned to De La
“ Vergne. Within ten days after the date of this
“ agreement, the certificates which represented the
“ one thousand shares of the stock of the Consoli-
“ dated Company, and written assignments of that
“ stock executed by the parties who held the cer-
“ tificates, were delivered to De La Vergne, but one

“hundred and twenty-five of these shares were held
“by P. J. Lingenfelder and Leo Rassieur as ex-
“ecutors, and ninety shares were held by them as
“trustees, under the will of E. Jungenfeld, deceased,
“and they assigned these shares without an order
“authorizing them so to do from the probate court
“in the State of Missouri in which the estate of
“Jungenfeld was in the process of administration.
“On April 27, 1891, four specific defects in the assign-
“ments of the thousand shares of stock were pointed
“out by counsel for De La Vergne, and the means of
“curing them were suggested. On April 29, 1891,
“these defects were cured by the delivery to the
“counsel of De La Vergne of suitable instruments
“of further assurance of title. No objection was
“made in this letter or at any time prior to April 10,
“1893, that the assignments of the executors and
“trustees were insufficient because no order of the
“probate court had been obtained authorizing the
“assignment. On the other hand, the counsel for
“De La Vergne wrote on April 27, 1891, respecting
“twenty-five of these shares, ‘These shares are
“transferred by the signature of P. J. Lingenfelder
“and Leo Rassieur, executors of Ed Jungenfeld,
“deceased, which, of course, would be regular.’
“In July, 1891, the former stockholders of the Con-
“solidated Company demanded the \$100,000 of cap-
“ital stock in the De La Vergne Company, but they
“received no response to their demand until Sep-
“tember 12, 1891, when the counsel for De La
“Vergne objected to issuing and delivering this
“stock on several frivolous grounds, one of which
“was that the stock of the Consolidated Company

" had not been assigned *in time*, and wrote, 'Pend-
 " ing further information on these points, I have
 " still in my possession the papers which you have
 " sent me, and sent to Mr. De La Vergne, which of
 " course if my views as above expressed are correct,
 " I am ready to pass over to whoever is legally en-
 " titled to the custody of the same, which is a ques-
 " tion which I am not willing personally to decide.'
 " The right to the assets of the Consolidated Com-
 " pany subject to its liabilities, and the good will of
 " its business, which are conveyed to the De La
 " Vergne Company by the bill of sale and agree-
 " ment of April 16, 1891, were never reconveyed;
 " the covenant of the stockholders to refrain from
 " transacting the ice making business for ten years
 " was never released, and none of the certificates
 " and assignments of the stock of that company
 " were ever delivered back to its former stockhold-
 " ers. It is assigned as error that upon this state of
 " facts the judgment should have been for the plain-
 " tiff.

" One who receives the benefits of the substantial
 " performance of a contract, and retains them, after
 " a technical default in the performance by his ad-
 " versary, until it is impossible to put the latter in
 " the situation in which he was when the contract
 " was made, and when the default occurred, cannot
 " entirely defeat an action for the specific perform-
 " ance of the contract or an action for the price
 " named in the agreement on the ground that the
 " plaintiff has failed to completely perform the con-
 " tract on his part. When a contract has been par-
 " tially performed and one of the parties to it makes

“ default, the other has a choice of remedies. He
 “ may and he must rescind or affirm the contract,
 “ but he cannot do both. If he would rescind it, he
 “ must immediately return whatever of value he has
 “ received under it, and then he may defend against
 “ an action for specific performance, or for the price
 “ of the property (if the agreement was a contract
 “ of sale) and he may recover back whatever he has
 “ paid or delivered under it. On the other hand, he
 “ may, and if he retains its benefits he does affirm
 “ the contract, and in that case he can maintain a
 “ suit for specific performance against his adversary
 “ or an action for damages for failure to perform, or
 “ he may, if opportunity offers, offset those damages
 “ against the amount he has agreed to pay under the
 “ contract. He cannot, however, while he retains
 “ the benefits of a substantial performance totally
 “ defeat an action for the price which he has agreed
 “ to pay or for the specific performance of the con-
 “ tract on his part, on the ground that the plaintiff
 “ has not completed the performance required of him
 “ by the contract. He cannot at the same time
 “ affirm the contract by retaining its benefits and re-
 “ scind it by repudiating its burdens. *Hunt v. Silk*,
 “ 5 East 449; *Hammond, Assignee of Ford*, v.
 “ *Buckmaster*, 22 Vt. 375; *Brown v. Witter*, 10
 “ Ohio 143; *Dodsworth v. Hercules Iron Works*, 13
 “ C. C. A. 552, 557; 66 Fed. Rep. 483. *Swain v.*
 “ *Seamens*, 9 Wall. 254, 272; *Beck v. Bridgman*,
 “ 40 Ark. 382, 390; *Andrews v. Hensler*, 6 Wall.
 “ 254, 258; *Conner v. Henderson*, 15 Mass. 319,
 “ 321; *Teter v. Hinders*, 19 Ind. 93; *Howard v.*
 “ *Hayes*, 47 N. Y. Sup. Ct. (Jones & Spencer) 89,

" 103; *Welsh v. Gossler*, 47 N. Y. Sup. Ct. (Jones
 " & Spencer) 104, 112; *Underwood v. Wolf*, 131
 " Ill. 425; *Brown v. Foster*, 108 N. Y. 387; *Van-*
 " *derbilt v. Eagle Iron Works*, 25 Wend. 665; *Lyon*
 " *v. Bertram*, 20 How. 149, 153, 154, 155; *Clark*
 " *v. Wheeling Steel Works*, 53 Fed. Rep. 494, 499;
 " *Voorhees v. Earl*, 2 Hill. 288, 294; *Barnett v.*
 " *Stanton*, 2 Ala. 181; *Churchill v. Holton*, 38
 " Minn. 519; *Treadwell v. Reynolds*, 21 Am. &
 " Eng. Encyc. of Law 557, note 2. The reason of
 " this principle is, that the retention of the benefits
 " of substantial performance after default, is utterly
 " inconsistent with the position that the default has
 " released the party who has received these benefits
 " so that he is not bound to perform his part of the
 " contract. It is a silent notice that performance will
 " be required of the defaulter and will be made by the
 " recipient of the benefits. The retention of the
 " rights or properties deprives the defaulting party
 " of all use of them, when if they were reconveyed
 " to him at once upon default, he might immediately
 " sell them to another for their value or use them
 " himself to his own advantage. When, therefore,
 " one has retained such property or the benefits de-
 " rived from such a contract without any claim that
 " default has been made or any notice of an intention
 " to refuse performance, for so long a time after the
 " default that the defaulting party has been deprived
 " of a substantial part of their value or their use, it
 " is unjust and inequitable to permit the recipient of
 " the benefits to totally defeat an action for the con-
 " tract price. The just rule is, that the contract
 " must then stand, that an action upon the contract

“can be maintained by him who has substantially
 “performed notwithstanding his technical default,
 “and that the amount of the recovery will be meas-
 “ured by the contract price less the damages sus-
 “tained by the defendant from the failure of the
 “plaintiff to complete the performance on his part.

“This rule applies to executory contracts of all
 “kinds—to contracts for the exchange, for the leas-
 “ing, and for the sale of real estate (*Beck v. Bridg-*
 “*man, Hunt v. Silk; Teter v. Hinders, Brown v.*
 “*Witter, Swain v. Seamens, supra*)—to contracts
 “for the manufacture and sale of machinery and
 “goods (*Hammond, Assignee of Ford v. Buckmas-*
 “*ter, Dodsworth v. Hercules Iron Works, Andrews*
 “*v. Hensler, Howard v. Hayes, supra*)—and to
 “contracts for the sale of personal property (*Lyon*
 “*v. Bertram, Clark v. Wheeling Steel Works, and*
 “other authorities cited *supra*).

“In *Beck v. Bridgman*, 40 Ark. 382, 390, Bridg-
 “man brought an action against Mrs. Beck to com-
 “pel specific performance of a contract between
 “them to exchange real and personal property.
 “Mrs. Beck had taken possession of Bridgman’s
 “real estate in Illinois, which was covered by the
 “contract, and he had given her title to all but ten
 “acres of it, but he could not and never did procure
 “for her the title to this ten acres. She refused to
 “convey to Bridgman her lands in Arkansas cov-
 “ered by the contract, because he had not conveyed
 “this ten acres, and insisted that he could not
 “recover on the contract because he had not com-
 “pleted and could not complete the performance of
 “it on his part. The court enforced specific per-

“formance and allowed Mrs. Beck \$300 for the failure of Bridgman to convey the ten acres. Judge Eakin in delivering the opinion of the Supreme Court of Arkansas, which affirmed this decree, said: ‘To allow her to hold all she could get of the Illinois property and give nothing in exchange would be absolutely shocking.’

“In *Hammond, Assignee of Ford v. Buckmaster*, 22 Vt. 375, 379, 380, Ford had agreed with Buckmaster, the defendant, to manufacture wool furnished by him into cloth and to deliver the cloth to him from time to time as it was manufactured. The defendant agreed to sell and consign the cloth, to advance to Ford one-third of the selling price as fast as the cloth was consigned, and to pay to him the residue of the price when it was collected, less the value of the wool. Some cloth had been delivered to the defendant and had been sold and consigned by him. Hammond, the assignee of Ford, sued him for the advances he had promised to make on these consignments and alleged performance on the part of Ford. The defense was that Ford had not performed his part of the contract, but had converted some of the cloth made from the wool of the defendant to his own use. The trial court charged the jury that if this was true it was a good defense to the action. The Supreme Court of Vermont said: ‘If the charge of the court can be sustained, it must be upon the ground, that a breach of the contract on the part of Ford gave to the defendant the right to repudiate it. But it could not have that effect. The general rule of law is, that a contract cannot

“be rescinded by one party, for the default of the
 “other, unless both parties can be placed *in statu*
 “*quo*, as before the contract. In the present case
 “the contract had been in part executed, and each
 “party had received a partial benefit from the con-
 “tract, and the parties could not be placed *in statu*
 “*quo*. The agreement in this case must stand and
 “the defendant must perform his part of it; and if
 “there has been a breach of the contract by the
 “other party, he must seek a compensation in dam-
 “ages of such party by a cross action.’

“In *Hunt v. Silk*, 5 East, 449, Silk agreed to
 “make certain alterations in a dwelling house and to
 “execute a lease to Hunt within ten days. There-
 “upon Hunt paid Silk ten pounds, and took and re-
 “tained possession of the house for twelve days.
 “Silk failed to make the alterations within the ten
 “days, and in twelve days Hunt surrendered posses-
 “sion and sued for his ten pounds. Lord Ellenbor-
 “ough said: ‘Now where a contract is to be re-
 “scinded at all, it must be rescinded in toto, and the
 “parties put in statu quo. * * * If the plaintiff
 “might occupy the premises two days beyond the
 “time when the repairs were to have been done and
 “the lease executed, and yet rescind the contract,
 “why might he not rescind it after a twelvemonth
 “on the same account. This objection cannot be
 “gotten rid of: the parties cannot be put in statu
 “quo.’ These expressions in this opinion, and the
 “decision that Hunt could not recover in that case
 “were quoted with approval by the Supreme Court
 “in *Lyon v. Bertram*, 20 How. 149, 153, 154.

“Perhaps these cases sufficiently illustrate the rule

“ we have been considering, and in our opinion the
“ case at bar falls far within it and must be governed
“ by it. Conceding that the two hundred and fifteen
“ shares of the capital stock of the Consolidated
“ Company which were held by Lingenfelder and
“ Rassieur as executors or trustees, were never legally
“ assigned to De La Vergne, because the assignments
“ made and delivered on April 26, 1891, were not
“ authorized by any order of the probate court, the
“ facts remain that the Consolidated Company and
“ its stockholders substantially performed their part
“ of this contract and that the defendants received
“ and retained all the benefits of their performance.
“ The rights and benefits which the defendants were
“ to receive from this contract were, the right of the
“ Consolidated Company to its assets subject to the
“ payment of its debts, the good will of its business
“ which had been established for six years, the sup-
“ pression of the competition of that company and of its
“ stockholders, and the legal control of the suppressed
“ corporation. The consideration the defendants
“ were to pay for these interests was one hundred
“ thousand dollars in stock or in money. They re-
“ ceived, retained and had the benefit of all these
“ rights and interests, and now refuse to pay the
“ agreed price, because the stockholders of the Con-
“ solidated Company failed to completely perform
“ their contract in that they did not legally assign to
“ De La Vergne, who received assignments of more
“ than three-fourths of its stock, less than one-fourth
“ of the stock of a corporation that had conveyed
“ away all of its assets and the good will of its busi-
“ ness. There is nothing in this record to show that

“this small minority of the stock was of any value.
“If it was, the defendants may undoubtedly show
“that fact under proper pleadings and offset the
“damage they have sustained by the failure to assign
“it, against the \$100,000 they promised to pay for
“the substantial benefits of this contract. But this
“is the limit of their defense, and the burden is upon
“them to establish it. There is no evidence in this
“record that it has any substantial merit, and it is
“exceedingly difficult to see how the failure to assign
“this small minority of the stock could have resulted
“in any damage to them whatever. However that
“may be, they did receive and retain the right of
“the corporation to its assets subject to its debts,
“the good will of its business, the suppression of the
“competition of the corporation and its stockholders,
“and, by the valid assignment of more than three-
“fourths of its stock, the legal control of the cor-
“poration. These would seem to be all the benefits,
“and they were certainly all the substantial benefits
“they could have received from the complete and
“technical performance of the contract. After the
“conveyance and covenant of April 16, 1891, was
“executed and delivered, the corporation was nothing
“but an empty shell. All its valuable rights and
“property had been vested in the De La Vergne
“Company, and the legal control of the shell itself
“was given to De La Vergne by the valid assign-
“ment of a majority of the stock of the corporation.
“These defendants cannot retain these benefits and
“thus make \$100,000 for themselves, and throw a
“loss of \$100,000 on the stockholders of this cor-
“poration because they technically failed to perform

“ their contract in the slight and immaterial particular that they did not legally assign a small minority of this stock.

“ In the statement in this opinion that the defendants received and retained all the substantial benefits of this contract, we have not overlooked the contention of counsel for the defendants that the letter of their counsel on September 12, 1891, constituted an offer to return the certificates and assignments of the stock and should, in law, have the effect of their redelivery. That letter was, in substance, a refusal to pay the purchase price for frivolous reasons, one of which was that the assignments were not made in time, because, although they were delivered before April 27, 1891, some powers of attorney and instruments of further assurance of title were, at the suggestion of the counsel for De La Vergne, forwarded to him two days later, and a statement that if his views were correct he was ready to pass over the papers which he and De La Vergne had received, to whomsoever was legally entitled to the custody of the same, which, he wrote, was a question he was unwilling to decide. It is not easy to see how this letter was an offer to return anything. It was an offer to deliver papers to some one on condition that his views were correct, but his views were not correct. The stipulation in the contract for a delivery of the assignments within ten days from its date was for the benefit of the defendants, and when their counsel, after the expiration of the ten days, and after the assignments were delivered, pointed out certain objections to them and suggested that these objec-

"tions should be remedied by instruments of further
 "assurance, and the stockholders of the Consoli-
 "dated Company complied with his suggestion and
 "forwarded these instruments within two days, and
 "no farther objection was made to the sufficiency of
 "their performance of the contract until September
 "12, 1891, that was a waiver of the objection that
 "these instruments were not delivered in time, if, in-
 "deed, it was not a waiver of every objection to them.
 "*Raymond v. San Gabriel Val. Land & Water*
 "*Company*, 4 C. C. A. 89, 53 Fed. Rep. 883; *Wil-*
 "*coxson v. Stitt*, 4 Pac. Rep. 429; *Smith v. Mohn*,
 "25 Pac. Rep. 696; *Kelly v. Berry*, 39 Wis. 669,
 "672; *Smith v. Pettee*, 70 N. Y. 13, 17; *Morgan*
 "*v. Herrick*, 21 Ill. 481; *Irvine v. Gregory*, 13
 "Gray 215; *Knox v. Schoenthal*, 13 N. Y. Sup. 7, 8.

"Moreover, an offer to deliver these papers to the
 "unknown person who was legally entitled to them,
 "was not an offer to deliver them to the stockhold-
 "ers of the Consolidated Company. The person
 "entitled to them was De La Vergne.

"Further, an offer to return them on September
 "12, 1891, if sufficient in form would have been an
 "idle ceremony. The defendants had undoubtedly
 "then derived all the benefits of a performance of
 "the contract by the Consolidated Company and its
 "stockholders that they could ever derive. They
 "still held the right to its assets subject to its debts,
 "the good will of its business, and the covenant of
 "its stockholders which suppressed its competition.
 "No doubt they had secured its customers and de-
 "stroyed all possible competition. The return to
 "the stockholders of the control over the empty

“shell of their corporation would have been a useless
 “act. A merchant cannot, by offering to return
 “the empty box, successfully defend an action for
 “the purchase price of a box of goods, on the
 “ground that the box was defective, when he has
 “received and sold the goods. The purchaser of a
 “note and a mortgage securing it cannot, by offer-
 “ing to reassign the mortgage, after he has col-
 “lected and surrendered the note, successfully de-
 “fend an action for the purchase price, on the
 “ground that the assignment of the mortgage to
 “him was defective. And the defendants could
 “not, after receiving and retaining for three months
 “the right of this corporation to its assets subject
 “to its debts, and the good will of its business, and
 “after destroying its competition, by offering to
 “return the control of the corporation shorn of its
 “property and rights, defeat the action for the price
 “they agreed to pay because they had not received
 “legal assignments of a minority of its stock.

“The contention that this action for the specific
 “performance of this contract cannot be maintained
 “under the decisions in *Norrington v. Wright*, 115
 “U. S. 188; *Hoare v. Rennie*, 5 H. & N. 19;
 “*Bowes v. Shand*, L. R. 2 App. Cas. 455; *Honck*
 “*v. Muller*, L. R. 7 Q. B. D. 92; *Reuter v. Sala*,
 “L. R. 4 C. P. D. 239, and like cases, until the
 “plaintiff proves a complete and technical perform-
 “ance of the contract on the part of the Consoli-
 “dated Company and its stockholders, has not
 “escaped consideration. The distinction between
 “those cases and the case at bar is, that the defend-
 “ants in the former had not received and retained

“anything under the contracts, for which they had
 “not paid the contract price, while the defendants
 “in this case have received and retained all the ben-
 “efits of a substantial performance of the contract
 “and have paid nothing. Those were actions for
 “the purchase price of goods, no part of which had
 “been accepted and used by the defendants without
 “paying therefor. This is an action for the pur-
 “chase price of property and rights which the de-
 “fendants have received and enjoyed the benefits
 “of. The distinction is clearly pointed out by the
 “Circuit Court of Appeals of the Third Circuit in
 “*Clark v. Wheeling Steel Works*, 53 Fed. Rep. 494,
 “498, where that court justly remarks: ‘If the
 “defendants in *Norrington v. Wright* had retained
 “and used the railroad iron delivered to them after
 “they had discovered the seller’s failure to ship the
 “stipulated quantities in February and March, they
 “would not have been justified in rescinding their
 “contract.’ This distinction is noted by Mr. Jus-
 “tice Gray in the opinion in *Norrington v. Wright*,
 “where he says: ‘This case wholly differs from
 “that of *Lyon v. Bertram*, 20 How. 149, in which
 “the buyer of a specific lot of goods accepted and
 “used part of them with full means of previously
 “ascertaining whether they conformed to the con-
 “tract.’ The case at bar is not ruled by *Norrington*
 “*v. Wright* and like cases, but falls within the
 “principle announced at the opening of this opinion
 “and is governed by *Lyon v. Bertram* and other
 “cases cited in support of it.

“If it is said that the defendants were not aware
 “that the assignments made by the executors and

"trustees were not authorized by orders of the pro-
 "bate court, and hence that they were excused from
 "rejecting them and returning the property which
 "they had received, the answer is, that it was as
 "easy for them to ascertain that fact in May and
 "June of 1891, when these parties could have been
 "placed *in statu quo*, as it was on April 10, 1893,
 "after they had derived all the benefits of the con-
 "tract, when they first raised the point by their
 "answer in this case. Moreover, the rule *caveat*
 "*emptor* governed them. They knew the law. They
 "had notice of all the facts that the diligent inquiry
 "of a reasonably prudent man would have discovered,
 "and they had reserved to themselves by the con-
 "tract sixty days after the assignments were deliv-
 "ered, to examine them and decide upon their suf-
 "ficiency before they were required to pay. The
 "fact that the assignments were executed by execu-
 "tors and trustees was notice sufficient to cast upon
 "them the duty to investigate the authority of these
 "officers, to object to it if insufficient, and to return
 "the property they had received within the sixty
 "days provided by the contract, or to forever after
 "hold their peace. They could not lawfully refuse
 "to investigate this question until they had appro-
 "priated to themselves all the benefits of the con-
 "tract and made it impossible for them to restore
 "the Consolidated Company to their original situa-
 "tion, and then for the first time make the investi-
 "gation and repudiate their obligations under the
 "contract.

"The judgment below must be reversed and the

“cause remanded with directions to grant a new trial, and it is so ordered.”

That the petitioner company and its co-defendant in said suits, the late John C. De La Vergne, filed amended answers in the said causes; but notwithstanding that part of the above decision which informed them that they might offset the damages they might have sustained by a failure to receive duly authorized assignments of all of the certificates of stock of the Consolidated, they failed to set up any such damage as a set off. The amended answers set up the same defenses as were made in the original answers, and in addition thereto contended that defendant De La Vergne had no authority to execute the contract for the petitioner company, and also set up at length want of power on the part of the two companies to enter into such a contract.

The evidence, which is contained in the record of the second hearing, consisted of the same agreed statement of facts which had been used at the first hearing, and which was offered at the last hearing by respondents, and evidence of the representative character of William C. Richardson, duly elected and qualified as Public Administrator of the City of St. Louis, as administrator of defendant, John C. De La Vergne, deceased, who had entered his appearance and adopted the amended answers of said defendant in the said suits, after the suggestion of the death of said defendant, and against whom the Circuit Court had duly revived said suits. (Rec., pp. 25 and 26.) Petitioner company offered in evidence depositions taken at Chicago, for the purpose of showing that respondents had broken their covenant

not to enter the business in which they had been engaged, and that they had abandoned the contract; it was incidentally established by such depositions that John Featherstones' Sons, of Chicago, was engaged in manufacturing the pattern of ice refrigerating machines, known to the trade as the Consolidated, before the assignment of the Consolidated Company, and after its assignment, by the consent of the assignee, and subsequently as purchaser of the right from the assignee. (Rec., p. 118.)

They also introduced depositions taken in New York, taken at the office of the petitioner company, for the purpose of showing that it had not authorized Mr. De La Vergne, its President, to make the contract, and had received nothing by reason thereof. The evidence shows the following, viz: that the De La Vergne Company, which was organized December 27th, 1880 (R. 300), had at the time of making the contract 3,500 shares, par value of \$100 each, of which John C. De La Vergne owned 3,100 shares (R. 208), and Louis E. De La Vergne, Louis Block and Charles H. Cone, three of the five directors or trustees of the company, each one share, which were presented to them by John C. De La Vergne (R. 245-246); that the De La Vergne Company by its agent, H. W. Guernsey, as early as January, 1891, more than three months before the making of the contract, was engaged at an expense of \$50 per day in examining the assets of the Consolidated Company, the total expense thus incurred and paid by it (De La Vergne Company) being \$1,020.61 (R. 206 and 327); that such examination which was finished February 4th, 1891, as per the account for services rendered,

disclosed that the net value of the assets of the Consolidated Company, not including its good will or patterns or drawings, and making due allowances for the cost of finishing the work of incompletd plants, expenses of realizing on outstandings, in his opinion, was \$44,179.10, and in the opinion of the Consolidated Company was \$163,566.53 over and above all liabilities; the latter estimate, however, including a valuation of a little over \$30,000 for patterns and drawings (R. 345, 346, 249, 250). That the good will of the Consolidated Company, according to one of the defendant's own witnesses, was worth, or rather could not have been acquired with an expenditure of less than \$50,000, and that the patterns and drawings had cost about \$100,000 (R. 272); that it had obtained orders or contracts in the sum of about \$1,300,000, in the year of its failure (1890), largely in the East, where Joseph Koenigsberg was its agent, and that such business had been taken at profitable figures or at higher prices than prior thereto; that the company had failed merely because of insufficient capital with which to do its work (R. 270-271).

The services of Mr. Koenigsberg, the Eastern agent, were deemed very valuable by Mr. De La Vergne (R. 355), and hence he was asked to sign and did sign the contract, consenting to and ratifying the same, although not named as a party therein (R. 46). The certificates of stock of the Consolidated Company were delivered on Saturday, April 25th, 1891, to Mr. De La Vergne within the ten days required by the terms of the contract, dated April 16th, 1891 (R. 47), and six days thereafter,

to-wit, on May 1st, 1891, a contract was entered into by the De La Vergne Company with said Koenigsberg (R. 304), by which he was bound for three years to serve the De La Vergne Company in its business, *or in the business of the Consolidated Ice Machine Company "as he might be directed to do;"* that thereupon Koenigsberg, while employed by the De La Vergne Company, rented the branch office of the Consolidated Company *in his own name* (R. 269 and 274), employed the former employes of the Consolidated Company *in his own name*, sought business *in his own name, as the former Eastern agent of the Consolidated Company*, paid all these outlays with his own checks, *but rendered a weekly account to the De La Vergne Company of such outlays and his salary and was thus reimbursed* (R. 266, 278, 279). In other words, while in the employ of the De La Vergne Company he held out to the world by his acts, and presumably by his statements, that he was continuing in the business as successor of the Consolidated Ice Machine Company. On September 14th, 1891, two days after the date of the letter in which Mr. Fitch, the attorney of the De La Vergne Company endeavored to state reasons for non-compliance by his client with their obligations under their contract with respondents, a circular appeared in which Koenigsberg announces his severance of all business connection with the Consolidated Company and his purpose to carry on *a business of his own at the old stand of the Consolidated Company* (R. 403). On September 15th, 1891, a letter was written by Mr. Banning, the patent attorney of the De La Vergne Company, to Mr. Fitch, the gen-

eral attorney, a copy of which appears in the said company's letter book (R. 404), wherein the patent attorney desires advice how best to modify the old card of the Consolidated Company *for use by Mr. Koenigsberg*. On October 15th, 1891, another advertisement appeared in a journal known as "The Western Brewer, etc." (R. 404, 363, 277), in which the De La Vergne Company, through its employe, Joseph Koenigsberg, without disclosing the name of the principal, apparently seeks trade on the strength of the name and good will of the Consolidated Ice Machine Company and on the prestige gained by 250 Consolidated machines in successful operation (R. 278).

The evidence also shows that the De La Vergne Company never made any arrangements to build machinery of the consolidated pattern (Rec., p. 200); that Mr. Koenigsberg received proposals from the Featherstones' Sons for the building of such machinery *in his own name* (Rec., pp. 279, 317), and finally, *in his own name*, made a contract with the Featherstones' Sons which created him their exclusive agent in the East (Rec., p. 356); and in no instance disclosing that he was in the employ of the De La Vergne Company, or acting as its agent (Rec., p. 279). The machines were billed by Featherstones' Sons to Mr. Koenigsberg (Rec., p. 306), and amounted to about \$45,000 (Rec., p. 210).

The contracts procured by Mr. Koenigsberg for machinery of the Consolidated pattern from May 1st, 1891, until the termination of his contract with the De La Vergne Company *were made in his own name and afterwards assigned to the De La Vergne*

Company (Rec., pp. 314, 315, 319, 322, 324, 325). The bonds given by Mr. Koenigsberg for the completion of machinery and protecting the purchasers against infringement claims were signed by Mr. De La Vergne as surety (Rec., pp. 318, 323, 327). Mr. Adolph Bender, the general manager of the De La Vergne Company, testified that he had no knowledge of Mr. Koenigsberg's employment (Rec., pp. 199, 204).

The record also shows that the increase of stock by the De La Vergne Company from \$350,000 to \$2,000,000, had been voted for February 4th, 1891, long before the contract was made (Rec., p. 207).

It further appears from the evidence that John R. Waters was employed in May, 1891, by petitioner company to purchase claims against the Consolidated Company, or procure contracts or options for such claims (Rec., p. 214), at an expense to the company of \$1000, \$712.02 and \$952.14, which were duly paid (Rec., pp. 338, 339, 341). That his reports to his employer, though called for, were not produced by Baron, the witness of petitioner company, by direction of its counsel, although in the possession of the witness (Rec., pp. 229, 230, 232 and 233). That said Waters, in July, 1891, made an offer in the name of the petitioner company of \$25,000 for the machinery, plant and goodwill of the Consolidated Company (Rec., p. 149).

That immediately after April 16th, 1891, to-wit, April 18th, 1891, Mr. De La Vergne obtained a letter from the assignee which gave him an opportunity and permission to inspect all the unfinished plants of the Consolidated Company (R. 334). Thereafter

he corresponded with the assignee regarding the affairs of the Consolidated Company as one interested in the same, and acted as advisor in the settlement of accounts outstanding, and the De La Verge Company thereafter furnished such small repairs as were required in the east (R., 329, 330, 331, 332.).

It further appears from the depositions that the evidence to which attention has just been called was elicited from defendant's own witnesses notwithstanding instructions of counsel for defendant company to one of said witnesses (Baron) to refuse to produce evidence under the control of such witness and which was located in the office of the defendant company (where the deposition was being taken), but kept in a book which said witness testified belonged to the estate of defendant John C. De La Vergne, and notwithstanding the refusal of such witness based upon such instructions to produce important evidence. (R., 229, 230, 232 and 233.)

It will be evident from the evidence as set out that the record of the cause as last tried is substantially the same as upon the first trial, and that the evidence taken in New York furnishes strong foundation for the views entertained and expressed by the Circuit Court of Appeals in its first opinion.

Upon request of the petitioner herein, the trial court made a special finding of the facts, and found them to be as they were set forth in the agreed statement, except as modified in the finding; the modification consisted in an express finding of no abandonment of the contract, no violation by respondents of their covenant, and that when the contract was entered into the value of the Consoli-

dated Company's assets and good will, *in the opinion of the petitioner* and its co-defendant, exceeded said assignor's liabilities.

Accordingly the Circuit Court rendered judgment for the respondents, and upon the hearing of the writ of error sued out by the petitioner alone, the Circuit Court of Appeals, in its *per curiam* opinion, decided that all the questions involved in the case should be determined in favor of the respondents, except the single question as to whether or not the contract is *ultra vires* the De La Vergne Co., upon which the judges were divided, and thereupon affirmed the judgment of the Circuit Court by a divided court.

It is now proposed by this petition to procure another hearing of these causes in this court.

BRIEF.

I.

The doctrine of *ultra vires* does not apply to the facts of this case under the statutes of the State of New York, under which the De La Vergne Company was organized.

Sec. 2, Chapter 333, Laws 1853, p. 1961,
Vol. 3, 1889, Rev. Stat. N. Y.

Sec. 3, Chapter 838, Laws 1866, p. 1967,
Vol. 3, 1889, Rev. Stat. N. Y.

II.

The doctrine of *ultra vires* does not apply to this case because the stock certificates mentioned in the contract were no longer valid certificates of subsisting stock in the Consolidated Ice Machine Company. The membership was dissolved "by unanimous consent of the members of the company."

Morawetz, Sec. 311.

"Ordinary private trading companies may at any time put an end to their transactions and voluntarily wind up their affairs."

Morawetz, Sec. 651.

III.

If the contract sued on can be fairly construed to be within the power granted to the De La Vergne Company, and at the same time admits of the construction that it be *ultra vires* such company, then the court will give such construction as will uphold the same.

Shore v. Wilson, 9 Clark & F., 397.

Noonan v. Bradley, 9 Wal., 394, 407.

Ormes v. Deuchy, 82 N. Y., 443.

Curtis v. Gokey, 68 N. Y., 304.

Sheffield v. Balmer, 52 Mo., 474.

Crittenden v. French, 21 Ills., 598.

Coke's Co. Lit, 42, 183.

Parson on Contracts, 8th Ed., Vol. 2, p. 618.

Jones on Construction of Contracts, sec. 223, 224.

Bishop on Contracts, sec. 392.

IV.

The refusal of the trial court to declare the law of this case or make special declarations of the law as prayed by petitioner was not error, since the cause was tried by the court upon a waiver of a jury.

Mercantile Mutual Ins. Co. v. Folsom, 18 Wal., 237.

“The refusal of the trial court to find immaterial or *incidental* facts, amounting only to evidence bearing on the *ultimate facts found* is not a proper subject of review.”

Hathaway v. Bank, 134 U. S., 494.

“A special finding of facts by the court need only state the *ultimate facts*, not the evidence.”

Mining Co. v. Taylor, 100 U. S., 37.

V.

The granting of the writ of certiorari by the Supreme Court is a branch of its jurisdiction which, it has held, “should be exercised sparingly and with great caution and only in cases of peculiar gravity and general importance,” or in cases requiring the exercise of such jurisdiction to secure uniformity of decision.

Ex parte Lau Ow Bew, 141 U. S., 583.

In re Woods, 143 U. S., 202.

American Constrction Co. v. Railroad Co.,
148 U. S., 372.

ARGUMENT.

I.

The doctrine of *ultra vires* does not apply to the facts of this case because the statutes of the State of New York, under which the De La Vergne Company was organized, gave full power to such corporation to make the contract sued on, even though the certificates of stock mentioned therein were essential to reacquire the title to the assets of the Consolidated Ice Machine Company under the insolvent laws of Illinois.

The De La Vergne Refrigerating Machine Company was organized December 27th, 1880, under the general incorporation act of the State of New York, adopted in 1848 and the amendments thereto; it is true, as is stated by counsel for petitioner, that section 8 of the general law provides as follows:

“It shall not be lawful for such company to use any of their funds in the purchase of any stock in any other corporation.”

It is, however, *not true* that the law of New York continued to prohibit investments by one manufacturing company in the stock of another until the enactment of 1890, referred to by counsel for petitioner.

By the laws of 1853 power was given to manufacturing corporations in the State of New York to acquire “*mines, manufactories AND OTHER PROPERTY NECESSARY FOR THEIR BUSINESS,*” which statute reads as follows:

“Sec. 2, Chap. 333, Laws 1853.—The trustees of
 “such company may purchase mines, manufactories
 “and *other property necessary for their business*,
 “and issue stock to the amount of the value thereof
 “in payment therefor, and the stock so issued shall
 “be declared and taken to be full stock.” (Statutes
 of 1889, p. 1961.)

It was further provided by an act of 1866 that
 stock in a manufacturing corporation *might be ac-*
quired by such a corporation and that the officers of
 the purchasing corporation might hold and be eligible
 to the office of trustees of such corporation the same
 as if they held the stock therein individually, which
 act reads as follows :

“Sec. 3, Chap. 838, Laws 1866.—It shall be law-
 “ful for any company heretofore or hereafter organ-
 “ized under the provisions of this act, or the act
 “hereby amended, *to hold stock* in the capital of
 “any corporation engaged in the business of mining,
 “*manufacturing*, or transporting such materials as
 “are required in the prosecution of the business of
 “such company, so long as they shall furnish or
 “transport such materials for the use of such com-
 “pany and for two years thereafter and no longer;
 “and also *to hold stock* in the capital of any corpor-
 “ation which shall use or manufacture material
 “mined or produced by such company; and the
 “trustees of such company shall have the same
 “power with reference to *the purchase of such stock*
 “*and issuing stock therefor* as are now given by the
 “law with reference to the purchase of mines, man-
 “ufactories and other property necessary to the
 “business of mining, manufacturing and other com-

“panies (Laws of 1853, *supra*). But the capital
 “stock of such company shall not be increased with-
 “out the consent of the owners of two-thirds of the
 “stock, to be obtained as provided by Sec. 21 and
 “22 of the act hereby amended.

“Sec. 4. When any such manufacturing com-
 “pany shall be a stockholder in any other corpora-
 “tion its president or other officers shall be eligible
 “to the office of trustee of such corporation, the
 “same as if they were individually stockholders
 “therein (Statutes of New York 1889, p. 1963,
 “Vol. 3).”

These laws were in full force and effect at the time of the organization of the De La Vergne Company, and at the time when the contract sued on was made.

It is clear that ample power is given to the De La Vergne Company to make the purchase of the right to the manufacturing establishment and other assets, including good will, of the Consolidated Ice Machine Company, notwithstanding the fact that such purchase was made subject to the liabilities of the creditors thereof. And if it became necessary to secure a vehicle for the complete transfer of such assets, these statutes are amply broad to cover the purchase of the power contained in the satisfied certificates of stock of the vendor company. The language of the statute is that such “manufactories and *other necessary property*” may be purchased.

In this case it is urged by the De La Vergne Company that it could not obtain possession of the property purchased by it, under the insolvent laws of Illinois, without the consent of the assignor com-

pany, and that such consent could only have been obtained in writing by acquiring the stock of the Consolidated Company. It may very well be said, therefore, that the power still contained in the certificates of stock was a necessary power to complete and perfect the acquiring of the property of the Consolidated Company and taking the same out of the hands of the assignee.

The law of 1866, however, plainly gave petitioner the power to acquire the stock of the Consolidated Ice Machine Company, it being a company engaged in the same kind of business in which the De La Vergne Company was engaged and manufacturing articles used and required by it (Rec., p. 210).

The Act of 1866 makes ample provision for representation of the purchasing corporation in the board of trustees or directors of the vendor corporation, and thus places the purchaser in a position to avail itself of all the rights which the ownership of stock confers.

Whether the foregoing sections of the Statutes of New York were omitted from the brief of counsel for petitioner through inadvertence or otherwise we do not know; but certain it is that they bear upon the issue of "*ultra vires*" presented in this case and are much more applicable and in point on the discussion of this question than the law of 1890, which went into effect on May 1st, 1891, after the execution of the contract in evidence, and which law is set out in full by counsel, together with an argument to establish that *that law* of 1890 did not cover the stock transferred in this case.

It is also insisted that the contract is void because it bound the De La Vergne Company to increase its capital stock. In answer to this proposition, we refer to that section of the law of 1853, above quoted, which plainly authorizes the increase of a corporation's stock for the purpose set forth in this contract.

If, however, it be urged that this law did not fully authorize the petitioner company to increase its capital, as counsel contend was the purpose and intent of this contract, then we submit that the contract did not necessarily OBLIGATE the De La Vergne Company to increase its capital stock.

The preamble sets forth that that company is "*now considering a plan of so increasing the capital stock of said company as will enable said company to have a full paid capital of \$2,000,000.00.*" But nowhere is it made *incumbent* upon the corporation to increase its capital. On the contrary, it is left optional with the petitioner company itself to increase its capital or to pay the contract price in money.

That it was never intended that the De La Vergne Company should be understood as *agreeing* to increase its stock for the purpose of carrying out this particular contract, is also made evident by the testimony taken on behalf of said defendant, which establishes that the stockholders of that company were already arranging for an increase of its capital before the beginning of the negotiations with these plaintiffs, to-wit: February 4, 1891, and consent of almost all the stockholders had been obtained. (Record, p. 208.)

But even if the defendant corporation had *agreed* to increase its stock, and to pay plaintiffs in stock of the increased issue, that would furnish no defense to these actions, for if it could not have been forced to pay in the manner agreed upon, it could still have been required to do so in another form.

This point is clearly passed on in the case of *Hitchcock v. Galveston*, 86 U. S., 51, where the City of Galveston agreed to pay plaintiff in bonds to be issued by it for certain street improvement work. It was held that although it was beyond the power of the city to issue the bonds, as it had agreed to do, that fact would not relieve it of making compensation in money. The court declared that: "The promise to give bonds to plaintiffs in payment for what they undertook to do, was therefore at farthest only *ultra vires*, and in such case, though specific performance of an engagement to do a thing transgressive of its corporate power may not be enforced, the corporation can be held liable on its contract. Having received benefits at the expense of the other contracting party, it cannot object that it was not empowered to perform what it promised in return, in the mode in which it promised to perform.

To the same effect, *State Board v. Railway Company*, 47 Ind., 407.

Parish v. Wheeler, 27 La. Ann., 449.

Fort Worth City Co. v. Smith Bridge Co.,
151 U. S., 294.

II.

The doctrine of *ultra vires* does not apply to this case because the stock certificates mentioned in the

contract were no longer valid certificates of subsisting stock in the Consolidated Ice Machine Company.

Counsel for petitioner assumes that the contract was made for the acquiring of stock when such is not the case in fact, and the courts have uniformly given the same a different construction. The language of the opinion rendered by the full bench of the Circuit Court of Appeals on the first hearing of this case, and the short opinion *per curiam* at the last hearing, leave no room for doubt that the contract in this case was a sale of the rights of the Consolidated Company to re-acquire its property from the assignee in accordance with the Illinois law, or on payment of its liabilities, and the right to the surplus remaining over at the termination of the proceedings of the assignment. The assignment of the so-called certificates of stock of the Consolidated Company was also contracted for in said agreement, as held in those opinions, and it was this fact, that it was one of the elements of the agreement, that led to the division of the judges on the single question, as to whether or not the contract was made *ultra vires* the De La Vergne Company on that account.

Counsel for petitioner, with apparent seriousness, say "if an equity existed it belonged to the corporation and not to the shareholders. If the corporation had anything to convey the transfer would have been in the name of the corporation by its proper officers thereunto duly authorized. If the other party to the contract failed to pay the consideration, the corporation, not the shareholders,

"either jointly or severally, must bring action thereon "to obtain redress." We answer that the *corporation did make the transfer in its own name by its officers duly authorized*, every shareholder, in addition to the corporation, signing the contract and joining in the conveyance, thus manifesting assent thereto and authorizing the same to be made by the corporation.

It is conceded by counsel for petitioner that the Consolidated Company, the assignor, was entitled to any surplus which might arise from the realization upon the assets after the payment of all of its creditors. A careful investigation of these assets and liabilities by the De La Vergne Company's agent disclosed that the right to said surplus was reasonably worth the price which was agreed to be paid therefor in stock or cash. It is evident from an inspection of the contract that the Consolidated Company acted in good faith and made no pretense that it was entitled to the immediate possession of any such surplus, or of any of the assets from which such surplus was to arise, or that the De La Vergne Company was led to expect anything more than it was given, namely, a valid conveyance of the rights aforementioned by the Consolidated Company, concurred in by all of its stockholders.

By this conveyance the De La Vergne Company was given a right to demand the surplus whenever it was ascertained and determined; an immediate right to all the assets of the Consolidated Company, including its good will, upon payment of the demands of all its creditors; a valid subsisting right for ten years to enjoin all the stockholders of the Consoli-

dated Company from entering, directly or indirectly, the business of selling ice and refrigerating machinery in these United States outside of Montana, excepting merely in the business of the De La Vergne Company, and to recover damages for a breach of the covenant assumed by the said stockholders in that regard. These rights were acquired by the De La Vergne Company immediately on the delivery of the conveyance and no subsequent assent of the Consolidated Company, or of any of its stockholders, was required to fortify or give validity to these rights; nor was it within the power of said last named company or of its stockholders to undo, recall or rescind said conveyance or annul these rights so long as the De La Vergne Company complied with or stood ready to comply with its obligations under the agreement.

That the De La Vergne Company did not see fit to avail itself of such of these rights as required immediate action to be taken in order to be secured, does not justify the position taken by counsel for petitioner, and which is urged with so much persistency that nothing was acquired by the contract except the certificates of stock therein referred to.

It will not avail a purchaser of the equity of redemption in real estate in defending a suit for the purchase price to make answer that the property has been sold under the deed of trust or mortgage resting on the same and did not realize sufficient to discharge the prior lien, any more than the vendor will be permitted to successfully claim any large amount which such a vendee is enabled to gain by

reason of a sale of the equity for a price largely in excess of the purchase price.

What was the position or legal status of the certificates of stock under this agreement? It is evident from the contract that the Consolidated Company had bound itself not to continue in the business in which it had been engaged when it sold all its rights of every kind in its assets, including its good will in said business. Such a sale was tantamount to a covenant on its part not to engage any further in its business. Its assets of every kind were in the hands of an assignee for administration under the insolvent law of the State of Illinois. These assets were first bound for the discharge of the company's liabilities, and the surplus, if any, would have been returned to the company for distribution among its stockholders, in accordance with their respective rights as holders of stock. The obligation to return to the stockholders this surplus arose immediately upon the receipt of the same by the Consolidated Company by reason of the fact that it had bound itself, by consent of all its shareholders, not to continue the business for which it was chartered. By transferring its right to the surplus, as was done by the contract in evidence, it was placed at once in the position in which it was proper to receive the covenant on the part of the purchaser to deliver and pay the purchase price direct to the shareholders in the proportion in which the shares were held by them. Such a payment, or the acceptance of the covenant to pay, completely satisfied and discharged the shares or stock held by said stockholders and left the certificates in the position in which the evidence

of ownership of shares in a defunct or wound-up corporation would be in—evidences of rights which had been fully discharged and satisfied. The papers or certificates of stock transferred under this agreement were exactly in the position or legal status set forth as above.

The *right* to the surplus or equity of redemption in the assets in the hands of the assignee had passed to the De La Vergne Company. The certificates of stock no longer represented any interest therein, and it is questionable whether or not sufficient life remained in the certificates to justify the holders thereof in giving any assent to the taking of the assets out of the hands of the assignee under the law of Illinois with the consent of a majority of the creditors in number and amount. But whether such power remained in the certificates or not was immaterial as far as the obligation of the De La Vergne Company was concerned, inasmuch as the Consolidated Company did not assume to convey that right, but only such rights as the circumstances surrounding the assets would enable it and its stockholders to convey.

If our position be correct, therefore, that these so-called certificates of stock of the Consolidated Company, which its stockholders covenanted and agreed to assign, were such in name and form only and not in substance, then they did not represent that which it is contended the law prohibited the De La Vergne Company from acquiring and the doctrine of *ultra vires* cannot be said to be applicable thereto.

The position taken by respondents was concurred in by the Circuit Court of Appeals in so far as the

shares were deemed merely a *shell* from which the substance had been taken, and is also confirmed by the conduct of the petitioner herein who failed to set up in its answer a claim by way of set-off for the value of such shares as were not fully conveyed to it as per their contention on the first trial.

III.

On the theory that the contract may possibly admit of the construction contended for by counsel for petitioner (but which theory we cannot concede) we submit that the construction contended for by us as hereinbefore set forth, is equally justified, and being in accord with the intent of the parties, and with a lawful purpose, ought to be upheld.

It is an elementary principle, "that where a contract admits of both a legal and illegal interpretation, it will be construed in its lawful sense, for the presumption is that the parties act in conformity to law."

This principle was early enunciated by Lord Lyndhurst in *Shore v. Wilson* (9 Clark and F., 397), who there said :

"The rule is this, and it is a fair and proper rule, that where a construction, consistent with lawful conduct and lawful intention, can be placed upon the words and acts of parties, you are to do so."

Lord Coke announced the rule to be as follows : "It is a general rule that whensoever the words of a deed, or the parties without deed, may have a double intendment, and the one standeth with the law and right, and the other is wrongful and against law, the

intendment that standeth with law shall be taken." (Co. Lit., 42, 183.)

In the case of *Ormes v. Dauchy* (82 N. Y., 443) it was said: "The law will not presume an agreement as void or illegal or against public policy; when it is capable of a construction which would make it consistent with the law and valid, it can not be considered as illegal."

In the early case of *Archibald v. Thomas* (3 Cow., 284), the learned judge in his opinion says: "But my opinion is based on the ground that where a contract admits of two significations, that ought to be adopted which renders it operative, rather than that which renders it null and void."

The rule is stated by Bishop in his work on Contracts (Sec. 392) to be, "If the terms admit of two meanings, or two ways, of effecting the object, by one of which the thing would be unlawful, and by the other lawful, the latter construction *must* be adopted."

And the principle has been upheld and approved in many cases cited by the learned author.

Applying the foregoing authorities to this cause, in which every question has been decided in favor of these respondents by the trial court, and every other question twice by the Circuit Court of Appeals, we submit that only such a construction should be placed on the contract as will render it lawful and operative, as was the evident intent of the parties when the same was made.

IV.

The petitioner, not content with the decision by both judges of the Circuit Court of Appeals, as to the other questions presented by the record, now seeks the review of this court by complaining that the trial court erred in refusing to make declarations of law upon the issue of law raised by the 6th, 7th and 8th pleas of the answers; this matter was presented by the petitioner in the trial court upon the close of the case by a request to declare ten abstract propositions of law (Rec., pp. 414, 415, 416).

We believe we sufficiently meet this objection by referring the court to the case of *Mercantile Mutual Ins. Co. v. Folsom*, 18 Wall., 237, in which it is held that where a case is tried before the court, upon a waiver of a jury, its refusal to grant conclusions or declarations of law does not constitute error.

The trial court was not silent upon any issue of fact presented by the pleadings. It found the ultimate facts which fully support the judgment and merely declined to make unnecessary declarations of law.

It is a well-established practice that where a case is tried, as this was, by the court without a jury, its findings upon questions of fact are conclusive in the Federal appellate courts.

Stanley v. Albany Co., 121 U. S., 535.

Allen v. St. Louis National Bank, 120 U. S., 20.

Bridge Co. v. Railroad Co., 92 U. S., 315.

And when a court to which a case has been so submitted, without a jury, has found the facts specifically, as did the court below, the only question open upon a writ of error *is the sufficiency of the facts found to support the judgment*; and the appellate court will not inquire whether the evidence was sufficient to support the *findings*.

Wile v. Farmers' State Bank, 17 C. C. A., 25; s. c. 70 F. R., 138.

Minchen v. Hart, 18 C. C. A., 570; s. c. 72 F. R., 294.

Woodbury v. Shawneetown, 20 C. C. A., 400, s. c. 74 F. R., 205.

Nor is error in the findings of facts subject to revision, if there was *any* evidence upon which such findings could be made.

Hathaway v. Bank, 134 U. S., 494.

It is scarcely necessary to do more than state these propositions, drawn from the cases cited, to show their application to the case at bar.

Counsel also argue that the court below erred in failing to make certain findings requested on behalf of petitioner. A mere glance at the findings so requested will indicate that they were not findings of ultimate or final facts, but a rehearsal of evidential facts, from which certain conclusions of fact could be reached.

We submit that the court below properly declined to find the facts, in the sense that it was bound to set out the evidence in the case.

"The refusal of the trial court to find immaterial or *incidental* facts, amounting only to evidence bear-

ing on the *ultimate facts found*, is not a proper subject of review."

Hathaway v. Cambridge First Nat'l Bank,
134 U. S., 494.

"A special finding of facts by the court need only state the *ultimate facts*, not the evidence."

Mining Co. v. Taylor, 100 U. S., 37.

V.

If this were a case which the Circuit Court of Appeals had deemed of general importance and peculiar gravity, or a case requiring the exercise of a higher jurisdiction to secure uniformity of decision, it would have been its privilege and duty under the law to have so declared, and to have certified any question therein, or the whole cause to this court for adjudication. The fact that said court did not so certify indicates that this cause is not one of general importance and peculiar gravity, and does not require the exercise of a higher jurisdiction to secure uniformity of decision, and hence does not belong to the class of cases which is entitled to be heard by the Supreme Court.

The case does belong to that large class of cases which Congress, when creating the Circuit Courts of Appeals, intended and expected those courts to decide as courts of last resort, and thus relieve the Supreme Court of some of its immense burdens.

In *Ex parte Lau Ow Bew*, 141 U. S., 583, this court held that a grave question of international law was involved, and that such a matter was of sufficient importance in itself and sufficiently open to controversy to justify the issuing of the writ.

In the case *In re Woods*, 143 U. S., 202, the construction of a Minnesota law was involved, but the court held that the case was not of sufficient importance and peculiar gravity and hence denied the writ.

In *Cunard S. S. Co. vs. Fabre*, an admiralty cause, an important question as to the rules of navigation was involved and deemed of sufficient importance and peculiar gravity and hence the writ was granted.

In the case of *Harman v. Harman*, lately decided, the Circuit Court of Appeals, as we have been informed, on the same record reached entirely different conclusions, and hence, in order to secure uniformity of decision, the court granted the writ.

What is there in the case at bar to justify the exercise of this high jurisdiction which has been so often denied and so rarely exercised?

This case with substantially the same record has had two hearings in the Circuit Court of Appeals and the same ultimate conclusion has been arrived at each time, thus preserving uniformity of decision. Upon the last hearing the judges of that court have divided upon only one question, which, upon the first hearing in that court, was presented in brief but not deemed worthy of mention in the opinion. The case presents nothing of general importance and peculiar gravity.

Petitioner, when confronted with the duty of stating reasons for its petition, alleges that the Circuit Court, when deciding this case, failed to decide or adjudge the question of *ultra vires*, which position the Circuit Court of Appeals by its decision nega-

tives ; complains of the law which requires an affirmance of the judgment of the trial court when the appellate court is equally divided upon any decisive question, and alleges that such an affirmance is no judgment at all ; and then complains that it has had no finding by the trial court upon the issues of law presented by its *ultra vires* pleas, no trial by the Circuit Court of Appeals on that question, and urges that such an extraordinary situation is presented which requires the issuance of the writ of certiorari.

Respondents respectfully submit that petitioner does not claim that this case is one of general importance and peculiar gravity, or requiring the exercise of this Honorable Court's jurisdiction to secure uniformity of decision, and respondents confidently urge that the case as presented does not belong to the class of cases in which this Honorable Court has seen fit heretofore to exercise its extraordinary jurisdiction of granting writs of certiorari, and hence respondents respectfully submit that a fifth hearing should be denied.

ELENEIOUS SMITH,
B. SCHNURMACHER,
LEO RASSIEUR,

Attorneys for Respondents.

IN THE
Supreme Court of the United States,
OCTOBER TERM, 1898.

THE DE LA VERGNE REFRIGER-
ATING MACHINE COMPANY,

Petitioner and Plaintiff in Error,

vs.

GERMAN SAVINGS INSTITU-
TION, ET AL.,

Defendants in Error.

No. 240.

BRIEF FOR DEFENDANTS IN ERROR.

Statement of Case.

This cause is a consolidation of eight causes under an order of the Circuit Court for the Eastern District of Missouri, made February 2, 1897. (Printed transcript, page 27.)

The plaintiffs were the owners of all of the issued stock of the Consolidated Ice Machine Company, an Illinois corporation, on the 16th day of April, 1891, and the defendants were the De La Vergne Refrigerating Machine Company, a New York cor-

poration, and John C. De La Vergne, its president and principal stockholder.

Pending the proceedings said John C. De La Vergne died, and William C. Richardson, the Public Administrator of the City of St. Louis, having taken charge of his Missouri estate, was substituted a party defendant in his place.

This cause has been before the United States Circuit Court of Appeals for the Eighth Circuit twice, and will be found reported in the 36 U. S. App., 184; 17 C. C. A., 34 (also 70 F. R., 146); and in the 28 U. S. App., 681 (also 84 F. R., 1016). When before that court on the last occasion a judgment for \$126,849.96 in favor of the plaintiffs and against the De La Vergne Refrigerating Machine Company, and against the assets of said deceased De La Vergne, in the hands of Richardson, Public Administrator, was affirmed, but by a divided court; the court being agreed on all propositions but one. The one on which the court divided was the question of whether the contract out of which the rights of action arose was *ultra vires* the De La Vergne Company. Thereupon said De La Vergne Company presented its petition in this court for a writ of *certiorari* to bring the record here, and such writ was granted by this court.

The facts underlying the controversy are, stated as briefly as is possible, the following:

The Consolidated Ice Machine Company (which for the sake of brevity will be hereafter referred to as the Consolidated Co.), was a corporation organized under the laws of Illinois for the purpose of

manufacturing and selling refrigerating and ice making machines. The entire amount of issued stock of said corporation was one hundred thousand dollars, held in various proportions by the plaintiffs to this consolidated cause. On October 14, 1890, the company made an assignment, under the general assignment laws of Illinois, to one R. E. Jenkins, for the benefit of its creditors. Its assets consisted in the main of a plant for the manufacture of refrigerating and ice making machines, located at Chicago, of patent rights, outstanding accounts, and the goodwill of its business, which the record shows was a large and extensive one. As will be presently shown by a more detailed reference to the record, the company was not insolvent, but had assumed contracts to such an extent that, with its comparatively limited capital, it was unable to carry them out. Its assets exceeded in value its liabilities, both in the opinion of its stockholders and in the opinion of the De La Vergne Refrigerating Machine Company (which will be hereafter referred to merely as the De La Vergne Co.), and by Mr. De La Vergne, as the court below specifically found. In fact, the records shows (Printed transcript, pp. 322-323, and 369-370, 407), that before entering into the contract which gave rise to this litigation the De La Vergne Co. and Mr. De La Vergne employed experts at considerable expense to visit Chicago and St. Louis and to make a careful investigation and examination of the assets of the Consolidated Co. and of their value; and it was not until favorable reports of these experts had been received, and after Mr. De La

Vergne had himself made extensive investigations, that the contract in question was entered into.

Under the assignment laws of Illinois the assignor is entitled to a discontinuance of the assignment proceedings, and to a re-conveyance and re-delivery of the assigned assets, either upon the satisfaction of his obligations or upon the request of a majority in number and amount of his creditors.

The stockholders of the Consolidated Co., satisfied that the assets of their company were sufficient in value to discharge all of their company's debts, and to leave a surplus for distribution amongst themselves, began negotiations through one of their number, Leo Rassieur, one of the plaintiffs, with several concerns in the business of manufacturing refrigerating and similar machinery, with a view to selling their equity therein. Among others, the De La Vergne Co., engaged in that same business in New York, became desirous of acquiring such interest in the Consolidated Company's assets, good will and trade. Correspondence began between Mr. De La Vergne and Mr. Rassieur, and between Mr. De La Vergne and Mr. Jenkins, the assignee, which extended over a period of several months; at the same time the experts above referred to were started on their work and Mr. De La Vergne began examinations himself. The accounts of the experts for outlays and personal services, the one at fifty and the other at twenty-five dollars per day, plus expenses, were paid by the De La Vergne Co.

The De La Vergne Co. and Mr. De La Vergne having satisfied themselves that the assets and good

will of the Consolidated Co. were worth at least \$100,000.00 over and above the amount of the obligations of said Consolidated Co., and being anxious to secure an immediate transfer thereof, on the 16th of April, 1891, entered into an agreement in writing with the plaintiffs, as the owners of all of the issued stock of the Consolidated Company, and with said company, whereby the said Consolidated Co. and its said stockholders did, by the said writing, bargain, sell and convey unto the said De La Vergne Co. all their right, title and interest in and to all of the assets of the Consolidated Co.; said transfer and conveyance, however, being subject to the payment of the debts and obligations of said Consolidated Co., and the custody thereof in the assignee, Jenkins. In other words, the De La Vergne Co. understood that in the purchase of these assets it could only secure possession thereof by paying the Consolidated Co.'s indebtedness, or, what might be more profitable, and what the record shows it attempted, by purchasing the claims of creditors at a discount, or by compromising with the creditors, until it thus secured a majority in number and amount of the indebtedness.

As a part of the agreement the several stockholders of the Consolidated Co. agreed that for a period of ten years they would not enter into the business of manufacturing or selling refrigerating or ice making machines, and "for the purpose of placing the De La Vergne Refrigerating Machine Co. in complete control of the assets of the Consolidated Ice Machine Co., and subject to the legal rights of said assignee, and the creditors of said party of the first part," (the Consolidated Company), the stockholders of

the Consolidated Co. agreed that within ten days after the date of said contract and conveyance, which was the 16th day of April, 1891, they would deliver to John C. De La Vergne, for the benefit of the De La Vergne Co., all of the stock which had been issued by the Consolidated Co.

In return for this conveyance of the assets, subject to the legal rights of the creditors, and the covenant of the various plaintiffs to this cause, to refrain from re-entering, directly or indirectly, into the refrigerating machine business for a period of ten years, the said De La Vergne and the said De La Vergne Co., on their part, agreed that within sixty days after the delivery of said shares of stock they would either deliver to the plaintiffs one hundred thousand dollars worth of stock of the De La Vergne Co., guaranteed by the contract to be worth that amount, or, at their option, would pay to said parties the sum of one hundred thousand dollars in cash.

It may be here remarked that no reconveyance has ever been made by said De La Vergne or his company to the plaintiffs or to their company, of said assets; nor have they or any of them ever been released from their said covenant, nor has any of the said stock which was duly delivered in accordance with the contract, assigned either to said De La Vergne, or assigned in blank, ever been re-conveyed or re-assigned. The contract so entered into, and upon which this cause turns, is as follows:

The Contract.

"This agreement made and entered into this sixteenth (16th) day of April, 1891, by and between

the Consolidated Ice Machine Company, a corporation of the City of Chicago, and State of Illinois, party of the first part, Jacob W. Skinkle, Edward Mallinekrodt, Leo Rassieur, Annie Jungenfeld, Frederick Widman, acting in their own right, P. J. Lingenfelder and Leo Rassieur, as Executors of the estate of Edmund Jungenfeld, deceased, and as trustees of Carl Jungenfeld, a minor, and the German Savings Institution, a banking corporation of the State of Missouri, who are the owners of the issued stock of said, The Consolidated Ice Machine Company, and control the unissued stock thereof by virtue of such ownership, parties of the second part, The De La Vergne Refrigerating Machine Company, a corporation of the City of New York, in the State of New York, party of the third part, and John C. De La Vergne, of the City of New York, aforesaid, party of the fourth part,

Witnesseth: whereas the said party of the first part on the fourteenth (14th) day of October, 1890, made an assignment for the benefit of its creditors to R. E. Jenkins, who is now engaged in winding up its affairs, and whereas further the assets of said party of the first part, in the opinion of the said parties of the second part, exceed in value the liabilities thereof, and consist in part of the good-will of said party of the first part (which good-will has been established by six years of successful manufacture of refrigerating and ice-making machines, together with an expenditure of the earnings from such manufacture), *and whereas the said party of the third part is willing to acquire such right as the said parties of the first and second parts can assign*

in and to the said assets, subject to the obligations of the said party of the first part; and whereas further, under the laws of the State of Illinois, under which the assignment aforesaid has been made, the said party of the first part is not entitled to the possession of its assets in the hands of the assignee aforesaid, until its obligations have been complied with and discharged, or the majority in number, and amount of its creditors have signified their willingness to the court having jurisdiction of said assignment, and an order has been obtained therefrom to have the said assets transferred and delivered by said Jenkins to the said party of the first part, or its assigns, and whereas further, the said party of the third part is now incorporated under the laws of the State of New York with a full paid capital stock of only three hundred and fifty thousand (350,000) dollars, divided into three thousand five hundred (3,500) shares of one hundred (100) dollars each, par value and its net assets, in the opinion of the said party of the fourth part are fully worth the sum of one million four hundred thousand (1,400,000) dollars; and whereas the said party of the third part and its stockholders are now considering a plan of so increasing the stock of said company as will enable said company to have a full paid capital of two million (2,000,000) dollars, one million four hundred thousand (1,400,000) dollars of which stock is to be issued to its present stockholders, 100,000 to the stockholders of the Consolidated Ice Machine Company under the terms of this agreement, and the remaining five hundred thousand (500,000) dollars of stock to be disposed of in the market at not less than par, and the

proceeds of such at par to become part and parcel of the assets of said De La Vergne Refrigerating Machine Company, the said party of the third part, such plan of increasing the stock of said party of the third part to be carried out either by an increase of stock, under the laws of the State of New York, or by the organization of a new company, under the laws of the State of New Jersey, or some other State, for the purpose of the purchasing of the assets and good will of the party of the third part.

Now, therefore, in view of the premises, and for and in consideration of the mutual advantages to be gained by the execution of this contract:

First. The said party of the first part and the said parties of the second part, agree and covenant to and with the said parties of the third and fourth parts to bargain, sell and convey, and **by these presents do bargain, sell and convey unto the said party of the third part all their right, title and interest in and to the assets of the said party of the first part, subject to the payment of its obligations, and subject to the custody thereof in the legal custodian, R. E. Jenkins, assignee, as aforesaid.**

Second. The said parties of the third and fourth parts covenant and agree to and with the said parties of the first and second parts to issue unto the said parties of the second part full paid stock in the said party of the third part to the amount of one hundred thousand dollars (\$100,000.00), and which stock so to be issued shall be issued unto the said parties respectively in the following proportions, to-wit:

To J. W. Skinkle.....	50-200
“ Edward Mallinckrodt.....	45-200
“ Leo Rassieur.....	40-200
“ Annie Jungenfeld.....	14-200
“ German Savings Institution.....	5-200
“ Frederick Widman.....	14-200
“ P. J. Lingenfelder and Leo Rassieur, as executors as aforesaid.....	18-200
“ P. J. Lingenfelder and Leo Rassieur, as trustees as aforesaid.....	14-200

Third. The said parties of the third and fourth parts covenant and agree that the net assets of the said party of the third part are fully worth one million four hundred thousand (1,400,000) dollars, not including the assets and rights purchased under this agreement, and that said stock in the De La Vergne Refrigerating Machine Company to be issued under this agreement to said parties of the second part shall represent not less than one-fifteenth (1-15) part of said assets, and that no additional stock be issued in the said company, or in the new company to be organized as hereinbefore set forth, beyond one million five hundred thousand (1,500,000) dollars par value, without actual value in the full amount being first received by said company, and the said parties of the third and fourth parts covenant and agree to and with the said parties of the second part that said parties of the second part shall have the privilege of examining said assets of the party of the third part until the first day of August, 1891, for the purpose of verifying the statement made herein concerning the value of said as-

sets, and that if it be ascertained that the actual value of said assets is not in accordance with the covenant hereinbefore set forth, then the said parties of the second part shall have the privilege and right of demanding that said stock so to be issued to them be made to accord with the covenant aforesaid, regarding value, and the said parties of the third and fourth parts covenant and agree to make said stock represent the value aforesaid; and it is further covenanted by and between the parties, that any examination made in good faith by the purchasers of at least one hundred thousand dollars (\$100,000.00) additional stock in said party of the third part, or in the new company to be organized for the purpose of acquiring the assets of said party of the third part shall be conclusive evidence upon the parties hereto as regards the net value of said assets, providing an opportunity be given to said parties of the second part of being represented and taking part in the making of any such examination.

Fourth. For the purpose of placing the said party of the third part in complete control of the assets of the party of the first part, *subject to the legal rights of said assignee, and the creditors of said party of the first part*, the said parties of the second part agree within ten (10) days from the date hereof to assign to said party of the fourth part, for the benefit of the said party of the third part, all the stock of the said party of the first part, which has been issued and which they guarantee has been paid in full, and within sixty (60) days thereafter the said parties of the third part and fourth parts agree to issue and de-

liver to said parties of the second part in the proportions aforementioned the stock of the said party of the third part to the amount of one hundred thousand (100,000) dollars.

Fifth. The said parties of the second part covenant and agree to and with said parties of the third and fourth parts to accept in lieu of the said stock in the said party of the third part, or of any successor to the said party of the third part, the sum of one hundred thousand (100,000) dollars in cash, at the option of said party of the fourth part.

Sixth. It is clearly understood by all the parties hereto that the said party of the third part by the acceptance of the above conveyance, does not make itself liable for any of the obligations and liabilities of the said party of the first part.

Seventh. The said parties of the second part covenant and agree to and with the said parties of the third and fourth parts for a period of ten (10) years from the date hereof not to enter into or become connected with the sale of refrigerating or ice-making machines, directly or indirectly, within the United States of North America, excepting the State of Montana, and excepting also the business of the said party of the third part, or of such company as becomes its successor and purchaser of all its rights.

In witness whereof the said parties of the second and fourth parts have hereunto set their hands and seals, and the said parties of the first and third parts have caused their respective presidents to affix

their names on the day and date first hereinbefore written.

(Signed) THE CONSOLIDATED ICE MACHINE CO.,
by J. W. SKINKLE, Pres. (Seal.)

(Signed) JACOB W. SKINKLE, (Seal.)

(Signed) EDWARD MALLINCKRODT, (Seal.)

(Signed) LEO RASSIEUR, (Seal.)

(Signed) ANNIE JUNGENSELD, (Seal.)

by LEO RASSIEUR, her Att'y in fact.

(Signed) FRED WIDMAN, (Seal.)

by LEO RASSIEUR, his Att'y.

(Signed) P. J. LINGENFELDER, (Seal.)

(Signed) LEO RASSIEUR, (Seal.)

Executors of the estate of Ed. Jungenseld, deceased.

(Signed) P. J. LINGENFELDER, (Seal.)

(Signed) LEO RASSIEUR, (Seal.)

Trustees of CARL JUNGENSELD, minor.

(Signed) GERMAN SAVINGS INSTITUTION, (Seal.)

by LEO RASSIEUR, its Att'y.

(Signed)

THE DE LA VERGNE REFRIGERATING MACHINE CO.,

by (Seal.)

JOHN C. DE LA VERGNE, Pres.

JOHN C. DE LA VERGNE, (Seal.)

I consent to the execution of above contract and ratify the same.

(Signed) J. KOENIGSBERG.

I consent to the execution of above contract and ratify the same.

(Signed) ANNA JUNGENSELD,
by H. A. HAEUSSLER, Att'y.

I consent to the execution of above contract and ratify same.

(Signed)

F. WIDMAN.

Herewith I ratify the execution of foregoing agreement by my co-executor and co-trustee, and adopt the same as my act as trustee and executor, and consent to such sale and contract.

P. J. LINGENFELDER,

Executor of E. Jungenfeld's Estate.

P. J. LINGENFELDER,

Trustee for Carl Jungenfeld, a minor.

The undersigned, German Savings Institution, herewith ratifies the execution of foregoing agreement and sale by Leo Rassieur, its attorney, and consents to said sale.

GERMAN SAVINGS INSTITUTION,
by RICHARD HOSPES, Cashier."

In accordance with the terms of the foregoing contract Mr. Rassieur forwarded to New York City all of the certificates of the issued stock of the Consolidated Co., assigned on the backs of the certificates, and the same were delivered to Mr. De La Vergne on April 25, 1891, and therefore within the ten days provided for by the contract. (Printed transcript, page 44.)

Two days thereafter, on April 27, 1891, Mr. Ashbell P. Fitch, attorney for Mr. De La Vergne, wrote Mr. Rassieur that Mr. De La Vergne had referred these certificates and the transfers endorsed upon them, to

him for examination, and he called attention to some technical objections, which he said he feared. These matters were thereupon promptly remedied and no further demands were made by De La Vergne or by his company or by his attorney.

In the month of July, 1891, and several times during that month and later, demands were made by Mr. Rassieur, for himself and his associates, upon the defendants, for the one hundred thousand dollars of stock or money, (Transcript, 48.) The result of these repeated demands was a letter from Mr. Fitch, dated September 12, 1891, in which he announced substantially, and for the first time, that defendants would decline to carry out their part of the contract. The grounds assigned for such conduct have been characterized by the United States Court of Appeals as "*frivolous*." The evidence preserved in the transcript discloses that between the day when the contract was entered into in April, and the date of this letter in September, the De La Vergne Co. had secured the former New York office of the Consolidated Co.; had secretly employed the former Eastern representative of the Consolidated Co., making contracts with former customers of the Consolidated Co. in the name of such representative, furnishing him, however, with the means whereby the same were performed, and taking assignments thereof secretly from him; and had practically secured all of the benefits and advantages of the contract, except the tangible Chicago assets, which it allowed to go to sale by the assignee; at this sale Mr. De La Vergne was present and offered for these

tangible assets alone (open outstanding accounts, &c., were not included) the sum of \$25,000.00.

In this situation of affairs, the De La Vergne Co. and De La Vergne declining to afford any compensation to the Consolidated Company's stockholders, suits were instituted on July 2, 1892, by attachment by said various stockholders against defendants, in the Circuit Court of the City of St. Louis. On petition of defendants the causes were removed from the State court to the United States Circuit Court for the Eastern District of Missouri.

When the causes were there reached for trial a jury was waived and they were submitted to the court, PHILLIPS, J. The court found a judgment in favor of the defendants, basing its result in the main upon the ground that certain of the stock of the Consolidated Co. which was vested in trustees for a minor, and in executors of a deceased party, did not pass to the defendants, and that, therefore, the plaintiffs could not recover, although said stock was but a small portion of all the stock embraced in the transaction.

The trial court proceeded on the theory that the subject of the contract and conveyance was not the assets, good will, etc. (the stock being merely the vehicle for placing defendants in more complete control of said assets, in the language of the contract itself,) but that the subject of the sale was *the stock*; and that if any part of it, however small, did not legally pass to the defendants, they were not liable to any of the plaintiffs.

From this judgment the German Savings Institution, one of the plaintiffs, sued out a writ of error and

the cause was taken to the United States Circuit Court of Appeals for the Eighth Circuit, where the judgment of the lower court was reversed, said Court of Appeals finding and declaring that under the contract the things conveyed and dealt with were the assets, good-will, trade, etc., of the Consolidated Co., the certificates of stock being merely the muniment or better evidence of title. The other causes, under stipulation, abided the result in the case of the German Savings Institution.

The case had been submitted in the Circuit Court upon an agreed statement of facts, which, for the convenience of the court, is here set forth in full, as follows:

Agreed Statement of Facts.

"In the above entitled causes it is hereby stipulated and agreed, by and between the several plaintiffs to said several causes, and the several defendants therein, that the said causes shall be taken by the court as submitted upon the pleadings and the following statement of facts:

That the defendant, the De La Vergne Refrigerating Machine Company is, and at all the times covered by the pleadings, was, a corporation organized under the laws of the State of New York, with its chief office in the City of New York, in said State, and the defendant John C. De La Vergne is, and at the time when these suits were brought was, a resident of the City of New York in said State. That on the 14th day of October, 1890, the Consolidated Ice

Machine Company was a corporation organized under the laws of the State of Illinois, and was engaged in the manufacture and sale of refrigerating and ice-making machines. That Exhibit One is the original certificate of papers of its incorporation, and correctly sets forth the subscriptions for stock which were made and reported to the Secretary of State before said certificate of organization was issued. That on said 14th day of October, 1890, said Consolidated Ice Machine Company made a general assignment for the benefit of its creditors to one R. E. Jenkins, and that at the time of said assignment the capital stock of said Consolidated Ice Machine Company consisted of two thousand shares of the par value of one hundred dollars each, of which said two thousand shares, five hundred subscribed and held by W. B. Bushnell had been forfeited to the company for non-payment of assessments; the five hundred subscribed by W. B. Bushnell as treasury stock had been subscribed by him to sell to workmen in the Consolidated Ice Machine Company, but were never sold or paid for, and that no certificate had ever been issued for them by said corporation, and that the remaining one thousand shares at said time were fully paid and appeared on the books of the company, and certificates for them were issued, transferred and held as follows:

(1.) Twenty-five shares represented by certificate No. 17 of said Consolidated Ice Machine Company, issued to Leo Rassieur and P. J. Lingensfelder, executors, and appearing in their names upon the books of the company, which certificate had been endorsed by them and thereupon delivered to

said German Savings Institution as collateral security.

(2.) Leo Rassieur, 200 shares; represented by certificates Nos. 5, 6, 7 and 8, each for fifty shares, issued to said Leo Rassieur, and appearing in his name upon the books.

(3.) Anna, or Annie Jungenfeld, 70 shares; represented by certificate number 12, and appearing in her name upon the books.

(4.) Jacob W. Skinkle, 250 shares; these shares appeared in his name upon the books of the company; the certificate for them he had theretofore delivered as collateral security for an indebtedness which he owed to the Merchants' National Bank, and said bank had delivered said certificate to him with power to make the contract hereinafter referred to in his name, said shares being represented by certificate No. 4.

(5.) Edward Mallinckrodt, 225 shares; represented by certificate No. 16, and appearing in his name on the books.

(6.) Ninety shares appearing on the books of the company in the name of E. Jungenfeld and represented by certificate No. 15; Leo Rassieur and P. J. Lingensfelder were at said time the duly appointed and qualified executors of the estate of E. Jungenfeld, deceased.

(7.) Leo Rassieur and P. J. Lingensfelder, trustees of Carl Jungenfeld, 70 shares; represented by certificate No. 13, and appearing in their names upon the books of the company.

(8.) Frederick Widman, 70 shares; represented by certificate No. 18, and appearing in his name upon the books of the company.

That the assets assigned by said Consolidated Ice Machine Company to said Jenkins consisted in the main of a plant for the manufacture of its machines, located in the City of Chicago, Illinois, of patent rights, outstanding accounts and the good will of its business, in which it had been engaged constantly for about six years. That at said time and for some time prior thereto, the De La Vergne Refrigerating Machine Company was also engaged in the manufacture and sale of refrigerating and ice-making machines, and defendant, John C. De La Vergne, was the principal stockholder and the president thereof.

That on the 16th day of April, 1891, the defendants, De La Vergne and The De La Vergne Refrigerating Machine Company and said Consolidated Ice Machine Company, and said several plaintiffs did enter into a contract in writing, of which the following is a copy:—

The Contract.

“This agreement made and entered into this sixteenth (16th) day of April, 1891, by and between the Consolidated Ice Machine Company, a corporation of the City of Chicago, and State of Illinois, party of the first part, Jacob W. Skinkle, Edward Mallinckrodt, Leo Rassieur, Annie Jungenfeld, Frederick Widman, acting in their own right, P. J. Lingensfelder and Leo Rassieur, as Executors of the

estate of Edmund Jungenfeld, deceased, and as trustees of Carl Jungenfeld, a minor, and the German Savings Institution, a banking corporation of the State of Missouri, who are the owners of the issued stock of said, The Consolidated Ice Machine Company, and control the unissued stock thereof by virtue of such ownership, parties of the second part, The De La Vergne Refrigerating Machine Company, a corporation of the City of New York, in the State of New York, party of the third part, and John C. De La Vergne, of the City of New York, aforesaid, party of the fourth part,

Witnesseth: whereas the said party of the first part on the fourteenth (14th) day of October, 1890, made an assignment for the benefit of its creditors to R. E. Jenkins, who is now engaged in winding up its affairs, and whereas further the assets of said party of the first part, in the opinion of the said parties of the second part, exceed in value the liabilities thereof, and consist in part of the good-will of said party of the first part (which good-will has been established by six years of successful manufacture of refrigerating and ice-making machines, together with an expenditure of the earnings from such manufacture), *and whereas the said party of the third part is willing to acquire such right as the said parties of the first and second parts can assign in and to the said assets, subject to the obligations of the said party of the first part;* and whereas further, under the laws of the State of Illinois, under which the assignment aforesaid has been made, the said party of the first part is not entitled to the possession of its assets in the hands of the assignee

aforesaid, until its obligations have been complied with and discharged, or the majority in number, and amount of its creditors have signified their willingness to the court having jurisdiction of said assignment, and an order has been obtained therefrom to have the said assets transferred and delivered by said Jenkins to the said party of the first part, or its assigns, and whereas further, the said party of the third part is now incorporated under the laws of the State of New York with a full paid capital stock of only three hundred and fifty thousand (350,000) dollars, divided into three thousand five hundred (3,500) shares of one hundred (100) dollars each, par value, and its net assets, in the opinion of the said party of the fourth part are fully worth the sum of one million four hundred thousand (1,400,000) dollars; and whereas the said party of the third part and its stockholders are now considering a plan of so increasing the stock of said company as will enable said company to have a full paid capital of two million (2,000,000) dollars, one million four hundred thousand (1,400,000) dollars of which stock is to be issued to its present stockholders, 100,000 to the stockholders of the Consolidated Ice Machine Company under the terms of this agreement, and the remaining five hundred thousand (500,000) dollars of stock to be disposed of in the market at not less than par, and the proceeds of such at par to become part and parcel of the assets of said De La Vergne Refrigerating Machine Company, the said party of the third part, such plan of increasing the stock of said party of the third part to be carried out either by an increase of stock, under the laws of the State of New York, or by the

organization of a new company, under the laws of the State of New Jersey, or some other State, for the purpose of the purchasing of the assets and good will of the party of the third part.

Now, therefore, in view of the premises, and for and in consideration of the mutual advantages to be gained by the execution of this contract :

First. The said party of the first part and the said parties of the second part, agree and covenant to and with the said parties of the third and fourth parts to bargain, sell and convey, and **by these presents do bargain, sell and convey unto the said party of the third part all their right, title and interest in and to the assets of the said party of the first part, subject to the payment of its obligations, and subject to the custody thereof in the legal custodian, R. E. Jenkins, assignee, as aforesaid.**

Second. The said parties of the third and fourth parts covenant and agree to and with the said parties of the first and second parts to issue unto the said parties of the second part full paid stock in the said party of the third part to the amount of one hundred thousand dollars (\$100,000.00), and which stock so to be issued shall be issued unto the said parties respectively in the following proportions, to-wit :

To J. W. Skinkle.....	50-200
“ Edward Mallinckrodt.....	45-200
“ Leo Rassieur.....	40-200
“ Annie Jungenfeld.....	14-200
“ German Savings Institution.....	5-200
“ Frederick Widman.....	14-200

- “ P. J. Lingenfelder and Leo Rassieur, as
executors as aforesaid.....18-200
- “ P. J. Lingenfelder and Leo Rassieur, as
trustees as aforesaid.....14-200

Third. The said parties of the third and fourth parts covenant and agree that the net assets of the said party of the third part are fully worth one million four hundred thousand (1,400,000) dollars, not including the assets and rights purchased under this agreement, and that said stock in the De La Vergne Refrigerating Machine Company to be issued under this agreement to said parties of the second part shall represent not less than one-fifteenth (1-15) part of said assets, and that no additional stock be issued in the said company, or in the new company to be organized as hereinbefore set forth, beyond one million five hundred thousand (1,500,000) dollars par value, without actual value in the full amount being first received by said company, and the said parties of the third and fourth parts covenant and agree to and with the said parties of the second part, that said parties of the second part shall have the privilege of examining said assets of the party of the third part until the first day of August, 1891, for the purpose of verifying the statement made herein concerning the value of said assets, and that if it be ascertained that the actual value of said assets is not in accordance with the covenant hereinbefore set forth, then the said parties of the second part shall have the privilege and right of demanding that said stock so to be issued to them be made to accord with the covenant afore-

said, regarding value, and the said parties of the third and fourth parts covenant and agree to make said stock represent the value aforesaid; and it is further covenanted by and between the parties, that any examination made in good faith by the purchasers of at least one hundred thousand dollars (\$100,000.00) additional stock in said party of the third part, or in the new company to be organized for the purpose of acquiring the assets of said party of the third part, shall be conclusive evidence upon the parties hereto as regards the net value of said assets, providing an opportunity be given to said parties of the second part of being represented and taking part in the making of any such examination.

Fourth. For the purpose of placing the said party of the third part in complete control of the assets of the party of the first part, *subject to the legal rights of said assignee, and the creditors of said party of the first part*, the said parties of the second part agree within ten (10) days from the date hereof to assign to said party of the fourth part, for the benefit of the said party of the third part, all the stock of the said party of the first part, which has been issued and which they guarantee has been paid in full, and within sixty (60) days thereafter the said parties of the third part and fourth parts agree to issue and deliver to said parties of the second part in the proportions aforementioned the stock of the said party of the third part to the amount of one hundred thousand (100,000) dollars.

Fifth. The said parties of the second part covenant and agree to and with said parties of the third

and fourth parts to accept in lieu of the said stock in the said party of the third part, or of any successor to the said party of the third part, the sum of one hundred thousand (100,000) dollars in cash, at the option of said party of the fourth part.

Sixth. It is clearly understood by all the parties hereto that the said party of the third part by the acceptance of the above conveyance, does not make itself liable for any of the obligations and liabilities of the said party of the first part.

Seventh. The said parties of the second part covenant and agree to and with the said parties of the third and fourth parts for a period of ten (10) years from the date hereof not to enter into or become connected with the sale of refrigerating or ice-making machines, directly or indirectly, within the United States of North America, excepting the State of Montana, and excepting also the business of the said party of the third part, or of such company as becomes its successor and purchaser of all its rights.

In witness whereof, the said parties of the second and fourth parts have hereunto set their hands and seals, and the said parties of the first and third parts have caused their respective presidents to affix their names on the day and date first hereinbefore written.

(Signed) THE CONSOLIDATED ICE MACHINE CO.,
by J. W. SKINKLE, Pres. (Seal.)

(Signed) JACOB W. SKINKLE, (Seal.)

(Signed) EDWARD MALLINCKRODT, (Seal.)

(Signed) LEO RASSIEUR, (Seal.)

(Signed) ANNIE JUNGENSELD, (Seal.)
by LEO RASSIEUR, her Att'y in fact.

(Signed) FRED WIDMAN, (Seal.)
by LEO RASSIEUR, his Att'y.

(Signed) P. J. LINGENFELDER, (Seal.)

(Signed) LEO RASSIEUR, (Seal.)

Executors of the estate of Ed. Jungenseld, deceased.

(Signed) P. J. LINGENFELDER, (Seal.)

(Signed) LEO RASSIEUR, (Seal.)

Trustees of CARL JUNGENSELD, minor.

(Signed) GERMAN SAVINGS INSTITUTION, (Seal.)

by LEO RASSIEUR, its Att'y.

(Signed)

THE DE LA VERGNE REFRIGERATING MACHINE CO.,

by (Seal.)

JOHN C. DE LA VERGNE, Pres.

JOHN C. DE LA VERGNE, (Seal.)

I consent to the execution of above contract and
ratify the same.

(Signed) J. KOENIGSBERG.

I consent to the execution of above contract and
ratify the same.

(Signed) ANNA JUNGENSELD,
by H. A. HAEUSSLER, Att'y.

I consent to the execution of above contract and
ratify same.

(Signed) F. WIDMAN.

Herewith I ratify the execution of foregoing agree-
ment by my co-executor and co-trustee, and adopt

the same as my act as trustee and executor, and consent to such sale and contract.

P. J. LINGENFELDER,
Executor of E. Jungenfeld's Estate.

P. J. LINGENFELDER,
Trustee for Carl Jungenfeld, a minor.

The undersigned, German Savings Institution, herewith ratifies the execution of foregoing agreement and sale by Leo Rassieur, its attorney, and consents to said sale.

GERMAN SAVINGS INSTITUTION,
by RICHARD HOSPES, Cashier."

It is further agreed that subsequently, to-wit, on the 23d day of April, 1891, Leo Rassieur addressed a letter to Joseph Koenigsberg, a copy of which is as follows:

"April 23d, 1891.

MR. JOSEPH KOENIGSBERG,

No. 213 E. 54th street, New York City, N. Y.:

Dear Sir—Enclosed please find certificates of Consolidated I. M. Co., as follows:

No. 17 to Leo Rassieur and P. J. Lingenfelder..	25 shares
“ 6 “ Leo Rassieur.....	50 “
“ 8 “ Leo Rassieur.....	50 “
“ 7 “ Leo Rassieur.....	50 “
“ 5 “ Leo Rassieur.....	50 “
“ 12 “ Anna Jungenfeld.....	70 “
“ 4 “ Jacob W. Skinkle.....	250 “
“ 16 “ Edward Mallinckrodt.....	225 “
“ 15 “ E. Jungenfeld Estate.....	90 “
“ 13 “ L. R. and P. J. L. for Carl Jungenfeld	70 “
“ 18 “ F. Widman	70 “
	<hr/>
	1,000 “

which please hand on Saturday, April 25th, to Mr. De La Vergne in person, this being the last day.

Yours very truly,

LEO RASSIEUR.”

That in this letter were enclosed certificates of stock of the Consolidated Ice Machine Company, with certain indorsements thereon, the originals of which are hereto attached and marked Exhibits 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12.

That the signature to the transfer of certificate No. 4 is that of J. W. Skinkle, plaintiff in case No. 3726; that the signature to transfers of certificates Nos. 5, 6, 7 and 8, is that of Leo Rassieur, plaintiff in case No. 3695; that the signature to transfer of certificate No. 12 is that of Anna Jungenfeld, plaintiff in case No. 3700; that the signatures to transfers of certificate No. 13, 15 and 17, are the handwriting of Leo Rassieur alone; that the signature to the transfer of said certificate No. 16, is that of Edw. Mallinckrodt, plaintiff in case No. 3698;

that the signature to transfer of certificate No. 18, is that of Fred Widman, plaintiff in case No. 3696.

That on the 25th day of April, 1891, said letter from Leo Rassieur to Joseph Koenigsberg of 23d day of April, 1891, together with said enclosures was received by said Koenigsberg; and that on said same 25th day of April, 1891, said Koenigsberg handed all said certificates of stock in the Consolidated Ice Machine Company endorsed as aforesaid, to defendant John C. De La Vergne; and that said John C. De La Vergne thereupon made upon the margin of said letter of the 23d day of April, 1891, the following endorsement:

“4-25, '91.

Received the above described stock from the hand of J. Koenigsberg.

JOHN C. DE LA VERGNE.”

That on the 27th day of April, 1891, Ashbell P. Fitch, attorney for defendant John C. De La Vergne, wrote and mailed to Leo Rassieur the following letter:

“April 27th, 1891.

LEO RASSIEUR.

Southwest Corner of Fourth and Market Sts.,
St. Louis, Mo.

Dear Sir:—Mr. De La Vergne has submitted to me the transfer of certificate No. 17 of 25 shares of the Consolidated Ice Machine Company, issued to you and Mr. Lingenfelder as executors of Edmund Jungenfeld's estate, dated September 11th, 1889.

These shares are transferred by the signature of P. J. Lingenfelder and Leo Rassieur, executors of

Ed Jungenfeld, deceased, which of course would be regular. In the body of the assignment, however, are the words 'to John C. De La Vergne by direction of the German Savings Institution, *owner hereof.*'

It seems to me that the statement that the German Savings Institution is owner of the shares of stock is notice to Mr. De La Vergne of their ownership in such form as would bind him. It seems to me further that if the German Savings Institution are the owners of this certificate, and Mr. De La Vergne has been notified thereof, that the signatures of the executors of the Jungenfeld estate is insufficient to transfer the certificate to Mr. De La Vergne, unless he holds some ratification of the transfer by the German Savings Institution.

I suppose there would be no difficulty in our getting some memoranda, signed in the proper form by the Institution, to the effect that they recognize and approve the transfer of this certificate to Mr. De La Vergne.

There are also several other matters to which I would like to call your attention in this connection.

The signature of the holders of the various certificates to the transfer of the same are not witnessed except in two cases: Mr. Skinkle's certificate No. 4, for 250 shares, is witnessed in lead pencil, and the Anna Jungenfeld certificate, No. 12, for 70 shares, is witnessed by Marguerite Von Jungenfeld.

The stock of the Jungenfeld estate is transferred by P. J. Lingensfelder and yourself, as executors, and I assume that the names of both executors were signed by you, probably, under some authority

which does not appear on the face of the paper. This is also the case in regard to certificate No. 13 for 70 shares, held by Mr. Lingenfelder and yourself, as trustees for Carl Lingenfelder (*sic*).

There is also a clause printed on the back of this stock in such a way as to be notice to us, which reads as follows :

The holder of any stock, who desires to sell the same or any part thereof, shall be required to tender such stock to the company, and to the stockholders thereof, at par for a period of sixty days, and shall only have the right to sell the same in open market after the company and its stockholders have declined to purchase the same.

I desire to suggest to you that the different questions raised by the facts which are mentioned above might be covered by some agreement signed by all the stockholders reciting that such a tender had been made to them and to the company, and declined, or that with knowledge of their rights in the premises, the different stockholders had waived this requirement and that this agreement might recite the sale of this stock to Mr. De La Vergne and be signed by Mr. Lingenfelder in his capacity as executor and in his capacity as trustee, and that it might also contain some recital and signature which would cover the question of the witnessing of the different transfers.

These are suggestions as to how this can be covered. Of course you will understand that in one way or other it will be necessary for me to have these points satisfactorily covered. This seems to me to be doubly necessary because it appears on the

face of the papers that there is an estate and trust involving minor children, and some of the stock is in the name of a lady, and you know how necessary it is under such circumstances to be careful to get the papers right while the people are all alive and while the transaction is known to us all.

Yours sincerely,

(Signed)

ASHBELL P. FITCH."

Which letter was received by said Leo Rassieur on the 29th day of April, 1891. That on said 29th day of April, 1891, Leo Rassieur replied to said A. P. Fitch in the following letter:

"St. Louis, April 29th, 1891.

A. P. FITCH, Esq., Atty. at Law.

93 Nassau street, New York City, N. Y.

Dear Sir:—In reply to your favor of the 29th inst. which came to hand to-day, I write to inform you that I shall comply with the request made therein by you.

The fact that all the stockholders have transferred to Mr. De La Vergne under an agreement joined in by the company, seemed to me sufficient to be construed as a waiver of that portion of our by-laws which requires that the stock should first be offered to the company and then to the stockholders thereof, but in order that every question may be fully disposed of to your entire satisfaction, I will have signed such an agreement as you suggest and have it signed by all stockholders, providing you will prepare same and send it on.

Miss Anna Jungenfeld is not in this country and

hence such signature as may be required of her will have to be made by her attorney in fact, Herman A. Haessler, Esq.

With a view to covering the two points suggested by you concerning the German Savings Institution stock and that which is held by Dr. Lingenfelder and myself as executors and trustees, I herewith enclose assignments made by them duly witnessed.

Yours very truly,

(Signed)

LEO RASSIEUR.

P. S. I also enclose my copy of original agreement duly ratified, upon receipt of which please send me Mr. De La Vergne's copy. L. R."

And that in said letter were enclosed three powers of attorney, all signed by the persons or parties whose names are attached thereto, and in language as follows:

"Know all men by these presents, that we, P. J. Lingenfelder and Leo Rassieur, as executors of the estate of Edmund Jungfeld, deceased, of the City of St. Louis, State of Missouri, do hereby constitute and appoint ——— our true and lawful attorney for us and in our names and behalf to sell, assign and transfer to John C. De La Vergne, Esq., our ninety (90) shares to us belonging in the capital stock of the Consolidated Ice Machine Company, evidenced by certificate No. 15 of said company, and for that purpose to make all necessary acts of assignment and transfer.

In witness whereof, we have hereunto set our

hands and seals this twenty-third day of April, 1891.

(Signed) P. J. LINGENFELDER, (Seal).

Executor Ed. Jungenfeld, deceased.

(Signed) LEO RASSIEUR, (Seal)

Executor Ed. Jungenfeld, deceased.

Executed in the presence of

(Signed) HUGO MUENCH.

2. Know all men by these presents, that the German Savings Institution, a banking corporation of the City of St. Louis, State of Missouri, does hereby constitute and appoint Hon. Ashbell P. Fitch its true and lawful attorney for it and in its name and behalf, to sell, assign and transfer unto John C. De La Vergne, Esq., its twenty-five shares (25) to it belonging in the capital stock of the Consolidated Ice Machine Company, evidenced by certificate No. 17 of said company, transferred by P. J. Lingenfelder and Leo Rassieur, executors (in whose name the same appeared on the books), by its directions to said John C. De La Vergne, and for that purpose to make all necessary acts of assignment and transfer.

In witness whereof, the said German Savings Institution has hereunto caused its cashier to affix his hand and its corporate seal this twenty-third day of April, 1891.

(Signed) GERMAN SAVINGS INSTITUTION.

(Seal)

Richard Hospes, Cashier.

Executed in presence of:

3. Know all men by these presents, that we, P. J. Lingenfelter and Leo Rassieur, as trustees of Carl Jungenfeld, a minor, under the will of Edm. Jungenfeld, deceased, and with full power of disposition over the assets in our hands, of the City of St. Louis, State of Missouri, do hereby constitute and appoint——our true and lawful attorney for us and in our names and behalf to sell, assign and transfer unto John C. De La Vergne, Esq., our seventy (70) shares to us belonging, in the capital stock of the Consolidated Ice Machine Company, evidenced by certificate No. 13 of said company, and for that purpose to make all necessary acts of assignment and transfer.

In witness whereof, we have hereunto set our hands and seals this twenty-third day of April, 1891.

(Signed) P. J. LINGENFELDER, (Seal)

Trustee Carl Jungenfeld, a minor.

(Signed) LEO RASSIEUR, (Seal)

Trustee Carl Jungenfeld, a minor.

Executed in presence of:

(Signed) HUGO MUENCH."

But that said powers, though purporting to be executed on the 23d day of April, 1891, were not actually executed until after the 25th day of April, 1891.

That in the month of July, and later, demand was made by Leo Rassieur on John C. De La Vergne, for the stock provided for in the agreement of April 16th, 1891, and that after said several demands Ashbell P. Fitch, attorney for John C. De La Vergne,

wrote and mailed to Leo Rassieur on September 12th, 1891, the following letter :

“September 12th, 1891.

LEO RASSIEUR. ESQ.

Dear Sir :—I am just out again after a long illness which has prevented my attending to any business for many weeks, and am handed now some letters of yours to Mr. John C. De La Vergne, dated in July and August, in regard to the matters pending between you and others and Mr. De La Vergne, of which I have charge for him.

These letters request the delivery of certain stock of the De La Vergne Company under a contract made April 16th, 1891, between the Consolidated Ice Machine Company and others, and Mr. De La Vergne.

On examining the contract and correspondence, it seems to me that under the contract you were bound within ten days from the date of the contract to fully and properly assign to Mr. De La Vergne all of the stock of the Consolidated Ice Machine Company which had been issued, and it seems to me further that it is clearly shown by my letter of April 27th, 1891, to you and your reply to me dated April 29th, 1891, and by other evidence that this was not done in time in accordance with the contract.

I am also informed that litigation, which has during my illness arisen in the State of Illinois in regard to the charter of the Consolidated Company, would affect the right of the stockholders or of the company to carry into effect such a contract as that of the 16th of April, 1891, even if the stockholders and

the company were not in default under the contract, as it seems to be they plainly are.

I am also informed that there is some question in litigation and otherwise affecting the ownership of the stock of the Consolidated Company.

Pending further information on these points, I have still in my possession the papers which you have sent to me, and sent to Mr. De La Vegne. which of course, if my views as above expressed are correct, I am ready to pass over *to whoever is legally entitled to the custody of the same, which is a question which I am not willing personally to decide.*

I shall be obliged if you will write to me and explain how far my conclusions above mentioned seem to you to be well founded, and also what, from your point of view, the present legal status of the Consolidated Company now is.

I am informed that the attorney-general of the State of Illinois has taken action which must result in the dissolution of the corporation.

I am not yet able to take up my regular work, and am going to Sharon Springs for a couple of weeks, but any letters sent to my office by you will be forwarded to me.

I regret to learn from your correspondence submitted to me that you have also been ill, and hope that you have fully recovered.

Yours sincerely,

(Signed)

ASHBELL B. FITCH."

Which letter was received by Leo Rassieur on September 16th, 1891.

It is further agreed that all the stock which Leo Rassieur and P. J. Lingenfelder attempted to transfer, either as trustees or as executors, excepting the 25 shares represented by certificate No. 17, belonged to said E. Jungenfeld at the time of his death and was derived from the estate of Edmund Jungenfeld, deceased, and that said 25 shares represented by said certificate No. 17 was acquired by Leo Rassieur and P. J. Lingenfelder, executors, in payment of a debt owing by Joseph Koenigsberg to said E. Jungenfeld at the time of his death, and that the authority of Leo Rassieur and P. J. Lingenfelder, if they had such authority either as executors of the estate of Edmund Jungenfeld, deceased, or as trustees for Carl Jungenfeld, to sell, exchange or transfer shares of stock in the Consolidated Ice Machine Company, is to be found in the last will and testament of Edmund Jungenfeld, deceased, which is as follows :

“Know all men by these presents, that I, the undersigned Edmund Jungenfeld, being of sound and disposing mind and memory, do make, declare and publish the following as and for my last will and testament, to-wit :

Firstly. It is my wish and will that my mother shall act as the guardian of the person and estate of my daughter Anna, who is now in her care.

Secondly. It is also my wish and will that my friends Louis P. Wilkins and Leo Rassieur shall be appointed as guardians of the person of my son Carl during his minority.

Thirdly. I desire my estate both real and personal to be divided into three equal shares or parts, and I give, bequeath and devise one undivided third thereof or one share to my daughter Anna, one share to my friends P. J. Lingenfelder and Leo Rassieur, as trustees of my son Carl, and the remaining share to Sophia Sander, who has for many years faithfully served me and my family and whose services I desire to acknowledge in a substantial manner.

To have and to hold the said respective shares unto the said Anna, my daughter, and to the said Sophia Sander and unto their heirs and assigns forever, and unto the said Lingenfelder and Rassieur as trustees for my son Carl, and unto their assigns and successors, in the trust hereby created, under the terms and conditions hereinafter set forth.

The said trustees shall retain control of, manage and invest said trust fund until my said son arrives at the age of twenty-eight (28) years when he shall be entitled to the same. My said trustees shall be required to provide him with the means to continue his education, and also provide him with all necessities; they shall furthermore make him such further allowances and payments as they may deem for his benefit and advantage, having due regard to the use to which the same are to be put and the capacity of my son to take care of such means as may be entrusted to him by my said trustees. My son shall at all times be privileged to require that annual accounts of his estate be rendered him, and in default of such accounting, the Circuit Court of St. Louis City is empowered upon his petition or the

petition of any friend to remove my said trustees and appoint one or more trustees in their places.

My said trustees shall have full power to convey, bargain and sell or lease any and all real estate that they possess and hold as part of said trust fund, and also have power to invest any and all funds in their charge as they may deem proper and profitable for their said trust estate.

Fourthly. I hereby nominate and appoint as executors of this will my said friends, P. J. Lingensfelder and Leo Rassieur, and also request that no bond be required of them in the discharge of their said duties. I give my executors full power to sell, convey and transfer any part or portion of my estate, if they deem it for the advantage of those interested as legatees. I also authorize and empower them to make any payments that I may owe on stock held by me in any incorporated company, particularly, however, the unpaid portion of my stock in the Consolidated Ice Machine Company of Chicago.

In witness whereof, I have hereunto set my hand at St. Louis City this nineteenth day of December, A. D. 1884.

EDMUND JUNGENSELD.

Signed, declared and published as and for his last will and testament by the above subscribed Edmund Jungensfeld, in our presence, who at his request, in his presence and in the presence of each other, have hereunto subscribed their names as witnesses thereof.

P. J. LINGENSELDER, WILHELM LEWITS,
MARY JOESEL, LEO RASSIEUR."

which said will had been duly probated in the Probate Court, City of St. Louis, Mo., and under which will

said Leo Rassieur and P. J. Lingenfelder duly qualified as executors.

It is further agreed that neither of the plaintiffs mentioned in this agreement ever furnished or offered to furnish defendants, or either of them, certificates of stock in the Consolidated Ice Machine Company issued in the name of John C. De La Vergne; and that no effort of any kind was ever made to deliver the stock in the Consolidated Ice Machine Company as contemplated in the said agreement of April 16th, 1891, except as hereinabove stated. That no order of court was ever made to authorize Leo Rassieur and P. J. Lingenfelder, or either of them, either as executors or as trustees, to make the sale or transfer of stocks contemplated by the said contract of April 16th, 1891. That when Ashbell P. Fitch wrote to Leo Rassieur on the 27th day of April, 1891, and thereafter, and all the times heretofore herein mentioned, said Leo Rassieur was the duly authorized agent and attorney of the parties plaintiff herein.

That the provision printed on the certificates of stock hereto attached as Exhibits 2 to 12 inclusive, as part of the by-laws of said Consolidated Ice Machine Company was in fact a part of said by-laws.

It is further agreed that defendants did not within sixty days after the said 25th day of April, 1891; nor did they at any time before or since, issue or deliver to any of the plaintiffs any stock whatever in the defendant company, nor in any other company, nor have they at any time paid any of the plaintiffs any cash money in lieu of stock, although, as is also

admitted to be a fact, plaintiffs have demanded of the defendants the one or the other.

It is further agreed that on the 9th day of October, 1891, an agreement was entered into between creditors of the Consolidated Ice Machine Company, whose claims amounted to over three hundred thousand dollars, looking to a purchase of a part of the assigned property of the said Consolidated Ice Machine Company including its plant and machinery. That of the parties plaintiff herein Fred. Widman, J. W. Skinkle, Leo Rassieur and German Savings Institution were at the time creditors of said company, and as such joined in said agreement. That in pursuance of said agreement two trustees named therein did purchase and acquire for said creditors said entire plant and machinery assigned by said Consolidated Ice Machine Company for about seventy thousand dollars, and that said trustees thereafter sold said plant and machinery for the benefit of all said creditors named in said agreement for about \$73,000; but that said plant and machinery were never operated by said trustees, or by said creditors or any of them.

It is further agreed that either party may read from the Revised Statutes of Illinois, 1891 (Hurd's), or from any other authentic revision or publication, in evidence in these causes such portions of the statutes and laws of the State of Illinois as he deems relevant to the issues, subject to objection for relevancy, and the matter so read shall be treated as if set forth in this agreement of fact."

The opinion of the Court of Appeals, reported in 36 U. S. A., 184, and 70 F. R., 146, is also here set out, for the court's convenience, and is as follows:

“The German Savings Institution, a corporation, the plaintiff in error, brought an action against the De La Vergne Refrigerating Machine Company, a corporation, and John C. De La Vergne, the principal stockholder of that corporation, the defendants in error, for that portion of the purchase price of the assets, good will and capital stock of the Consolidated Ice Machine Company, a corporation, which the defendants in error promised to pay to it by a written agreement made on April 16, 1891. The plaintiff was a stockholder of the Consolidated Ice Machine Company, and the defendants answered that the plaintiff and his co-stockholders had failed to assign the stock of that company as they had promised to do in this agreement. The case was tried by the court upon an agreed statement of facts, and a judgment was rendered for the defendants. These were the material facts:

“The De La Vergne Refrigerating Machine Company, hereafter called the De La Vergne Company, was a corporation of the State of New York, and the Consolidated Ice Machine Company, hereafter called the Consolidated Company, was a corporation of the State of Illinois. These corporations were engaged in manufacturing and selling ice-making machines and were rivals in that business. On October 14, 1890, the Consolidated Company made a general assignment for the benefit of its creditors. On April 16, 1891, that company and its stockholders, one of whom was the plaintiff,

"made a bill of sale and an agreement with the De
 "La Vergne Company and De La Vergne which re-
 "cites that, 'whereas * * * the assets of
 "the said party of the first part (the Consol-
 "idated Company) in the opinion of the said
 "party of the second part (its stockholders), exceed
 "in value the liabilities thereof, and consist in part
 "of the good will of said party of the first part
 "(which good will has been established by six
 "years of successful manufacture of refrigerating
 "and ice-making machines, together with an ex-
 "penditure of the earnings from such manufacture),
 "and whereas the said party of the third part (the
 "De La Vergne Company) is willing to acquire such
 "rights as the said parties of the first and second
 "parts can assign in and to the said assets, subject
 "to the obligations of said party of the first part; * *
 "Now, therefore, in view of the premises, and for
 "and in consideration of the mutual advantages to
 "be gained by the execution of this contract,' the
 "Consolidated Company and its stockholders 'agree
 "and covenant to and with the parties of the third
 "and fourth parts (the De La Vergne Company and
 "De La Vergne) to bargain, sell and convey, and
 "by these presents do bargain, sell and convey unto
 "the said party of the third part, all their right, title
 "and interest in and to the assets of the said party
 "of the first part, subject to the payment of its obli-
 "gations;' the De La Vergne Company and De La
 "Vergne covenanted and agreed to issue to the
 "plaintiff in error the full paid capital stock of the
 "De La Vergne Company to the amount of twenty-
 "five hundred dollars par value, to issue to its co-

“ stockholders a proportionate amount of such stock
 “ so that all the stockholders would receive in the
 “ aggregate \$100,000 in such stock ; the stockholders
 “ of the Consolidated Company agreed to assign to
 “ De La Vergne, within ten days from the date of
 “ the agreement, all the full paid stock of the Con-
 “ solidated Company, which was one thousand
 “ shares, to take \$100,000 in cash in lieu of the
 “ \$100,000 in stock of the De La Vergne Company,
 “ and promised and agreed not to enter into the
 “ business of selling ice-making machines in the
 “ United States, except in the State of Montana, for
 “ ten years, and the De La Vergne Company and
 “ De La Vergne agreed to issue the one hundred
 “ thousand dollars of capital stock in the De La
 “ Vergne Company to the stockholders of the Con-
 “ solidated Company within sixty days after the
 “ stock of the latter company was assigned to De La
 “ Vergne. Within ten days after the date of this
 “ agreement, the certificates which represented the
 “ one thousand shares of the stock of the Consoli-
 “ dated Company, and written assignments of that
 “ stock executed by the parties who held the cer-
 “ tificates, were delivered to De La Vergne, but one
 “ hundred and twenty-five of these shares were held
 “ by P. J. Lingenfelter and Leo Rassieur as ex-
 “ ecutors, and ninety shares were held by them as
 “ trustees under the will of E. Jungenfeld, deceased,
 “ and they assigned these shares without an order
 “ authorizing them so to do from the probate court
 “ in the State of Missouri in which the estate of
 “ Jungenfeld was in the process of administration.
 “ On April 27, 1891, four specific defects in the assign-

"ments of the thousand shares of stock were pointed
 "out by counsel for De La Vergne, and the means
 "of curing them were suggested. On April 29, 1891,
 "these defects were cured by the delivery to the
 "counsel of De La Vergne of suitable instruments
 "of further assurance of title. No objection was
 "made in this letter or at any time prior to April 10,
 "1893, that the assignments of the executors and
 "trustees were insufficient because no order of the
 "probate court had been obtained authorizing the
 "assignment. On the other hand, the counsel for
 "De La Vergne wrote on April 27, 1891, respecting
 "twenty-five of these shares, 'These shares are
 "transferred by the signature of P. J. Lingenfelder
 "and Leo Rassieur, executors of Ed Jungensfeld,
 "deceased, which, of course, would be regular.'
 "In July, 1891, the former stockholders of the Con-
 "solidated Company demanded the \$100,000 of cap-
 "ital stock in the De La Vergne Company, but they
 "received no response to their demand until Sep-
 "tember 12, 1891, when the counsel for De La
 "Vergne objected to issuing and delivering this
 "stock on several frivolous grounds, one of which
 "was that the stock of the Consolidated Company
 "had not been assigned *in time*, and wrote, 'Pend-
 "ing further information on these points, I have
 "still in my possession the papers which you have
 "sent me, and sent to Mr. De La Vergne, which of
 "course if my views as above expressed are correct,
 "I am ready to pass over to whoever is legally en-
 "titled to the custody of the same, which is a ques-
 "tion which I am not willing personally to decide.'
 "The right to the assets of the Consolidated Com-

“pany subject to its liabilities, and the good will of
 “its business, which are conveyed to the De La
 “Vergne Company by the bill of sale and agree-
 “ment of April 16, 1891, were never reconveyed;
 “the covenant of the stockholders to refrain from
 “transacting the ice making business for ten years
 “was never released, and none of the certificates
 “and assignments of the stock of that company
 “were ever delivered back to its former stockhold-
 “ers. It is assigned as error that upon this state of
 “facts the judgment should have been for the plain-
 “tiff.

“One who receives the benefits of the substantial
 “performance of a contract, and retains them, after
 “a technical default in the performance by his ad-
 “versary, until it is impossible to put the latter in
 “the situation in which he was when the contract
 “was made, and when the default occurred, cannot
 “entirely defeat an action for the specific perform-
 “ance of the contract or an action for the price
 “named in the agreement on the ground that the
 “plaintiff has failed to completely perform the con-
 “tract on his part. When a contract has been par-
 “tially performed and one of the parties to it makes
 “default, the other has a choice of remedies. He
 “may and he must rescind or affirm the contract,
 “but he cannot do both. If he would rescind it, he
 “must immediately return whatever of value he has
 “received under it, and then he may defend against
 “an action for specific performance, or for the price
 “of the property (if the agreement was a contract
 “of sale) and he may recover back whatever he has
 “paid or delivered under it. On the other hand, he

" may, and if he retains its benefits he does affirm
 " the contract, and in that case he can maintain a
 " suit for specific performance against his adversary
 " or an action for damages for failure to perform, or
 " he may, if opportunity offers, offset those damages
 " against the amount he has agreed to pay under the
 " contract. He cannot, however, while he retains
 " the benefits of a substantial performance totally
 " defeat an action for the price which he has agreed
 " to pay or for the specific performance of the con-
 " tract on his part, on the ground that the plaintiff
 " has not completed the performance required of him
 " by the contract. He cannot at the same time
 " affirm the contract by retaining its benefits and re-
 " scind it by repudiating its burdens. *Hunt v. Silk*,
 " 5 East 449; *Hammond, Assignee of Ford*, v.
 " *Buckmaster*, 22 Vt. 375; *Brown v. Witter*, 10
 " Ohio 143; *Dodsworth v. Hercules Iron Works*, 13
 " C. C. A. 552, 557; 66 Fed. Rep. 483. *Swain v.*
 " *Seamens*, 9 Wall. 254, 272; *Beck v. Bridgman*,
 " 40 Ark. 382, 390; *Andrews v. Hensler*, 6 Wall.
 " 254, 258; *Conner v. Henderson*, 15 Mass. 319,
 " 321; *Teter v. Hinders*, 19 Ind. 93; *Howard v.*
 " *Hayes*, 47 N. Y. Sup. Ct. (Jones & Spencer) 89,
 " 103; *Welsh v. Gossler*, 47 N. Y. Sup. Ct. (Jones
 " & Spencer) 104, 112; *Underwood v. Wolf*, 131
 " Ill. 425; *Brown v. Foster*, 108 N. Y. 387; *Van-*
 " *derbilt v. Eagle Iron Works*, 25 Wend. 665; *Lyon*
 " v. *Bertram*, 20 How. 149, 153, 154, 155; *Clark*
 " v. *Wheeling Steel Works*, 53 Fed. Rep. 494, 499;
 " *Voorhees v. Earl*, 2 Hill. 288, 294; *Barnett v.*
 " *Stanton*, 2 Ala. 181; *Churchill v. Holton*, 38
 " Minn. 519; *Treadwell v. Reynolds*, 21 Am. &

“Eng. Encyc. of Law 557, note 2. The reason of
 “this principle is, that the retention of the benefits
 “of substantial performance after default, is utterly
 “inconsistent with the position that the default has
 “released the party who has received these benefits
 “so that he is not bound to perform his part of the
 “contract. It is a silent notice that performance will
 “be required of the defaulter and will be made by the
 “recipient of the benefits. The retention of the
 “rights or properties deprives the defaulting party
 “of all use of them, when if they were reconveyed
 “to him at once upon default, he might immediately
 “sell them to another for their value or use them
 “himself to his own advantage. When, therefore,
 “one has retained such property or the benefits de-
 “rived from such a contract without any claim that
 “default has been made or any notice of an intention
 “to refuse performance, for so long a time after the
 “default that the defaulting party has been deprived
 “of a substantial part of their value or their use, it
 “is unjust and inequitable to permit the recipient of
 “the benefits to totally defeat an action for the con-
 “tract price. The just rule is, that the contract
 “must then stand, that an action upon the contract
 “can be maintained by him who has substantially
 “performed notwithstanding his technical default,
 “and that the amount of the recovery will be meas-
 “ured by the contract price less the damages sus-
 “tained by the defendant from the failure of the
 “plaintiff to complete the performance on his part.
 “This rule applies to executory contracts of all
 “kinds—to contracts for the exchange, for the leas-
 “ing, and for the sale of real estate (*Beck v. Bridg-*

“*man, Hunt v. Silk; Teter v. Hinders, Brown v. Witter, Swain v. Seamens, supra*)—to contracts for the manufacture and sale of machinery and goods (*Hammond, Assignee of Ford v. Buckmaster, Dodsworth v. Hercules Iron Works, Andrews v. Hensler, Howard v. Hays, supra*)—and to contracts for the sale of personal property (*Lyon v. Bertram, Clark v. Wheeling Steel Works, and other authorities cited supra*).

“In *Beck v. Bridgman*, 40 Ark. 382, 390, Bridgman brought an action against Mrs. Beck to compel specific performance of a contract between them to exchange real and personal property. Mrs. Beck had taken possession of Bridgman’s real estate in Illinois, which was covered by the contract, and he had given her title to all but ten acres of it, but he could not and never did procure for her the title to this ten acres. She refused to convey to Bridgman her lands in Arkansas covered by the contract, because he had not conveyed this ten acres, and insisted that he could not recover on the contract because he had not completed and could not complete the performance of it on his part. The court enforced specific performance and allowed Mrs. Beck \$300 for the failure of Bridgman to convey the ten acres. Judge Eakin in delivering the opinion of the Supreme Court of Arkansas, which affirmed this decree, said: ‘To allow her to hold all she could get of the Illinois property and give nothing in exchange would be absolutely shocking.’

“In *Hammond, Assignee of Ford v. Buckmaster*, 22 Vt. 375, 379, 380, Ford had agreed with Buck-

“ master, the defendant, to manufacture wool furn-
 “ ished by him into cloth and to deliver the cloth to
 “ him from time to time as it was manufactured.
 “ The defendant agreed to sell and consign the
 “ cloth, to advance to Ford one-third of the selling
 “ price as fast as the cloth was consigned, and to
 “ pay to him the residue of the price when it was
 “ collected, less the value of the wool. Some cloth
 “ had been delivered to the defendant and had been
 “ sold and consigned by him. Hammond, the
 “ assignee of Ford, sued him for the advances he had
 “ promised to make on these consignments and
 “ alleged performance on the part of Ford. The
 “ defense was that Ford had not performed his part
 “ of the contract, but had converted some of the
 “ cloth made from the wool of the defendant to his
 “ own use. The trial court charged the jury that if
 “ this was true it was a good defense to the action.
 “ The Supreme Court of Vermont said: ‘If the
 “ charge of the court can be sustained, it must be
 “ upon the ground, that a breach of the contract on
 “ the part of Ford gave to the defendant the right
 “ to repudiate it. But it could not have that effect.
 “ The general rule of law is, that the contract cannot
 “ be rescinded by one party, for the default of the
 “ other, unless both parties can be placed *in statu*
 “ *quo*, as before the contract. In the present case
 “ the contract had been in part executed, and each
 “ party had received a partial benefit from the con-
 “ tract, and the parties could not be placed *in statu*
 “ *quo*. The agreement in this case must stand and
 “ the defendant must perform his part of it; and if
 “ there has been a breach of the contract by the

“other party, he must seek a compensation in damages of such party by a cross action.”

“In *Hunt v. Silk*, 5 East, 449, Silk agreed to make certain alterations in a dwelling house and to execute a lease to Hunt within ten days. Thereupon Hunt paid Silk ten pounds, and took and retained possession of the house for twelve days. Silk failed to make the alterations within the ten days, and in twelve days Hunt surrendered possession and sued for his ten pounds. Lord Ellenborough said: ‘Now where a contract is to be rescinded at all, it must be rescinded in toto, and the parties put *in statu quo*. * * * If the plaintiff might occupy the premises two days beyond the time when the repairs were to have been done and the lease executed, and yet rescind the contract, why might he not rescind it after a twelvemonth on the same account. This objection cannot be gotten rid of: the parties can not be put *in statu quo*.’ These expressions in this opinion, and the decision that Hunt could not recover in that case were quoted with approval by the Supreme Court in *Lyon v. Bertram*, 20 How., 149, 153, 154.

“Perhaps these cases sufficiently illustrate the rule we have been considering, and in our opinion the case at bar falls far within it and must be governed by it. Conceding that the two hundred and fifteen shares of the capital stock of the Consolidated Company which were held by Lingenfelder and Rassieur as executors or trustees, were never legally assigned to De LaVergne, because the assignments made and delivered on April 26, 1891, were not

“ authorized by any order of the probate court, the
“ facts remain that the Consolidated Company and
“ its stockholders substantially performed their part
“ of this contract and that the defendants received
“ and retained all the benefits of their performance.
“ The rights and benefits which the defendants were
“ to receive from this contract were, the right of the
“ Consolidated Company to its assets subject to the
“ payment of its debts, the good will of its business
“ which had been established for six years, the sup-
“ pression of the competition of that company and of its
“ stockholders, and the legal control of the suppressed
“ corporation. The consideration the defendants
“ were to pay for these interests was one hundred
“ thousand dollars in stock or in money. They re-
“ ceived, retained and had the benefit of all these
“ rights and interests, and now refuse to pay the
“ agreed price, because the stockholders of the Con-
“ solidated Company failed to completely perform
“ their contract in that they did not legally assign to
“ De La Vergne, who received assignments of more
“ than three-fourths of its stock, less than one-fourth
“ of the stock of a corporation that had conveyed
“ away all of its assets and the good will of its busi-
“ ness. There is nothing in this record to show that
“ this small minority of the stock was of any value.
“ If it was, the defendants may undoubtedly show
“ that fact under proper pleadings and offset the
“ damage they have sustained by the failure to assign
“ it, against the \$100,000 they promised to pay for
“ the substantial benefits of this contract. But this
“ is the limit of their defense, and the burden is upon
“ them to establish it. There is no evidence in this

" record that it has any substantial merit, and it is
 " exceedingly difficult to see how the failure to assign
 " this small minority of the stock could have resulted
 " in any damage to them whatever. However that
 " may be, they did receive and retain the right of
 " the corporation to its assets subject to its debts,
 " the good will of its business, the suppression of the
 " competition of the corporation and its stockholders,
 " and, by the valid assignment of more than three-
 " fourths of its stock, the legal control of the cor-
 " poration. These would seem to be all the benefits,
 " and they were certainly all the substantial benefits
 " they could have received from the complete and
 " technical performance of the contract. After the
 " conveyance and covenant of April 16, 1891, was
 " executed and delivered, the corporation was noth-
 " ing but an empty shell. All its valuable rights and
 " property had been vested in the De La Vergne
 " Company, and the legal control of the shell itself
 " was given to De La Vergne by the valid assign-
 " ment of a majority of the stock of the corporation.
 " These defendants cannot retain these benefits and
 " thus make \$100,000 for themselves, and throw a
 " loss of \$100,000 on the stockholders of this cor-
 " poration because they technically failed to perform
 " their contract in the slight and immaterial particu-
 " lar that they did not legally assign a small minority
 " of this stock.

" In the statement in this opinion that the defend-
 " ants received and retained all the substantial bene-
 " fits of this contract, we have not overlooked the
 " contention of counsel for the defendants that the
 " letter of their counsel on September 12, 1891, con-

stituted an offer to return the certificates and assignments of the stock and should, in law, have the effect of their redelivery. That letter was, in substance, a refusal to pay the purchase price for frivolous reasons, one of which was that the assignments were not made in time, because, although they were delivered before April 27, 1891, some powers of attorney and instruments of further assurance of title were, at the suggestion of the counsel for De La Vergne, forwarded to him two days later, and a statement that if his views were correct he was ready to pass over the papers which he and De La Vergne had received, to whomsoever was legally entitled to the custody of the same, which, he wrote, was a question he was unwilling to decide. It is not easy to see how this letter was an offer to return anything. It was an offer to deliver papers to some one on condition that his views were correct, but his views were not correct. The stipulation in the contract for a delivery of the assignments within ten days from its date was for the benefit of the defendants, and when their counsel, after the expiration of the ten days, and after the assignments were delivered, pointed out certain objections to them and suggested that these objections should be remedied by instruments of further assurance, and the stockholders of the Consolidated Company complied with his suggestion and forwarded these instruments within two days, and no farther objection was made to the sufficiency of their performance of the contract until September 12, 1891, that was a waiver of the objection that these instruments were not delivered in time, if, in-

“ deed, it was not a waiver of every objection to them.
 “ *Raymond v. San Gabriel Val. Land & Water*
 “ *Company*, 4 C. C. A. 89, 53 Fed. Rep. 883; *Wil-*
 “ *corson v. Stitt*, 4 Pac. Rep. 429; *Smith v. Mohn*,
 “ 25 Pac. Rep. 696; *Kelly v. Berry*, 39 Wis. 669,
 “ 672; *Smith v. Pettee*, 70 N. Y. 13, 17; *Morgan*
 “ *v. Herrick*, 21 Ill. 481; *Irvine v. Gregory*, 13
 “ Gray 215; *Knox v. Schoenthal*, 13 N. Y. Sup. 7, 8.

“ Moreover, an offer to deliver these papers to the
 “ unknown person who was legally entitled to them,
 “ was not an offer to deliver them to the stockhold-
 “ ers of the Consolidated Company. The person
 “ entitled to them was De La Vergne.

“ Further, an offer to return them on September
 “ 12, 1891, if sufficient in form would have been an
 “ idle ceremony. The defendants had undoubtedly
 “ then derived all the benefits of a performance of
 “ the contract by the Consolidated Company and its
 “ stockholders that they could ever derive. They
 “ still held the right to its assets subject to its debts,
 “ the good will of its business, and the covenant of
 “ its stockholders which suppressed its competition.
 “ No doubt they had secured its customers and de-
 “ stroyed all possible competition. The return to
 “ the stockholders of the control over the empty
 “ shell of their corporation would have been a useless
 “ act. A merchant cannot, by offering to return
 “ the empty box, successfully defend an action for
 “ the purchase price of a box of goods, on the
 “ ground that the box was defective, when he has
 “ received and sold the goods. The purchaser of a
 “ note and a mortgage securing it cannot, by offer-
 “ ing to reassign the mortgage, after he has col-

" lected and surrendered the note, successfully de-
 " fend an action of the purchase price, on the
 " ground that the assignment of the mortgage to
 " him was defective. And the defendants could
 " not, after receiving and retaining for three months
 " the right of this corporation to its assets subject
 " to its debts, and the good will of its business, and
 " after destroying its competition, by offering to
 " return the control of the corporation shorn of its
 " property and rights, defeat the action for the price
 " they agreed to pay because they had not received
 " legal assignments of a minority of its stock.

" The contention that this action for the specific
 " performance of this contract cannot be maintained
 " under the decisions in *Norrington v. Wright*, 115
 " U. S. 188; *Hoare v. Rennie*, 5 H. & N. 19;
 " *Bowes v. Shand*, L. R. 2 App. Cas. 455; *Honck*
 " *v. Muller*, L. R. 7 Q. B. D. 92; *Reuter v. Sala*,
 " L. R. 4 C. P. D. 239, and like cases, until the
 " plaintiff proves a complete and technical perform-
 " ance of the contract, on the part of the Consoli-
 " dated Company and its stockholders, has not
 " escaped consideration. The distinction between
 " those cases and the case at bar is, that the defend-
 " ants in the former had not received and retained
 " anything under the contracts, for which they had
 " not paid the contract price, while the defendants
 " in this case have received and retained all the ben-
 " efits of a substantial performance of the contract
 " and have paid nothing. Those were actions for
 " the purchase price of goods, no part of which had
 " been accepted and used by the defendants without
 " paying therefor. This is an action for the pur-

"chase price of property and rights which the de-
 "fendants have received and enjoyed the benefits
 "of. The distinction is clearly pointed out by the
 "Circuit Court of Appeals of the Third Circuit in
 "*Clark v. Wheeling Steel Works*, 53 Fed. Rep. 494,
 "498, where that court justly remarks: 'If the
 "defendants in *Norrington v. Wright* had retained
 "and used the railroad iron delivered to them after
 "they had discovered the seller's failure to ship the
 "stipulated quantities in February and March, they
 "would not have been justified in rescinding their
 "contract.' This distinction is noted by Mr. Jus-
 "tice Gray in the opinion in *Norrington v. Wright*,
 "where he says: 'This case wholly differs from
 "that of *Lyon v. Bertram*, 20 How. 149, in which
 "the buyer of a specific lot of goods accepted and
 "used part of them with full means of previously
 "ascertaining whether they conformed to the con-
 "tract.' The case at bar is not ruled by *Norrington*
 "*v. Wright* and like cases, but falls within the
 "principle announced at the opening of this opinion
 "and is governed by *Lyon v. Bertram* and other
 "cases cited in support of it.

"If it is said that the defendants were not aware
 "that the assignments made by the executors and
 "trustees were not authorized by orders of the pro-
 "bate court, and hence that they were excused from
 "rejecting them and returning the property which
 "they had received, the answer is, that it was as
 "easy for them to ascertain that fact in May and
 "June of 1891, when these parties could have been
 "placed *in statu quo*, as it was on April 10, 1893,
 "after they had derived all the benefits of the con-

"tract, when they first raised the point by their
 "answer in this case. Moreover, the rule *caveat*
 "*emptor* governed them. They knew the law. They
 "had notice of all the facts that the diligent inquiry
 "of a reasonably prudent man would have discovered,
 "and they had reserved to themselves by the con-
 "tract sixty days after the assignments were deliv-
 "ered, to examine them and decide upon their suf-
 "ficiency before they were required to pay. The
 "fact that the assignments were executed by execu-
 "tors and trustees was notice sufficient to cast upon
 "them the duty to investigate the authority of these
 "officers, to object to it if insufficient, and to return
 "the property they had received within the sixty
 "days provided by the contract, or to forever after
 "hold their peace. They could not lawfully refuse
 "to investigate this question until they had appro-
 "priated to themselves all the benefits of the con-
 "tract and made it impossible for them to restore
 "the Consolidated Company to their original situa-
 "tion, and then for the first time make the investi-
 "gation and repudiate their obligations under the
 "contract.

"The judgment below must be reversed and the
 "cause remanded with directions to grant a new trial,
 "and it is so ordered."

It will be observed that in the opinion of the Court
 of Appeals the plaintiffs were entitled to recover
 from defendants the \$100,000.00 stipulated to be
 paid by the contract, but that possibly under amended
 pleadings, and upon a further showing of the facts,

defendants might be able to reduce the amount thereof by showing that the shares of stock concerning the title to which in defendants some doubt existed, had a value; respecting which, however, the court added: "There is nothing in this record to show that this small minority of the stock was of any value. If it was the defendants may undoubtedly show that fact under proper pleadings, and offset the damage they have sustained by the failure to assign it, against the \$100,000.00 they promised to pay for the substantial benefits of this contract. *But this is the limit of their defense, and the burden is upon them to establish it.* There is no evidence in this record that it has any substantial merit, and it is exceedingly difficult to see how the failure to assign this small minority of the stock could have resulted in any damage to them whatever."

The causes having thus returned to the Circuit Court, the defendants filed amended answers therein, which answers will be found on page 18 of the printed transcript. When analyzed and condensed the answers will be found to present the following pleas:

1. After admitting the incorporation of the De La Vergne Company and its non-residence, and that of defendant De La Vergne, all other allegations of the petition are generally denied, under the practice sanctioned by the Missouri code of practice.

2. A denial that any assets of the Consolidated Company ever came into the possession of defendants, but that all of said assets remained in the custody and possession of the assignee and were by him disposed of in due course of law, for

the benefit of the Consolidated Company's creditors; and that said assets were insufficient to discharge the established liabilities of said company. That no assets of said company were ever tendered to or received by defendants under the contract. That plaintiffs failed to assign or transfer to defendants any of the shares of stock, either within the time provided for by the contract, or at any time prior to the institution of the suit. That plaintiffs did not observe their covenants to refrain for ten years from the date of the contract from entering into or becoming connected with the sale of refrigerating or ice making machines, but on the contrary did violate said covenants by embarking in such business.

3. That De La Vergne had no authority to execute said contract on behalf of the De La Vergne Co.; that no benefits of any kind accrued to said company under said contract; that it never accepted or received any assets of said Consolidated Co., nor any of the stock of said company; and that it never in any manner ratified or approved said contract, but rejected the same.

4. That plaintiffs consented to and acquiesced in an abandonment of the contract.

5. That the contract was not authorized by the Consolidated Co. and that it was made without the authority of said company. That all of the stockholders of said company did not unite in said contract, and that the estate of Edward Jungenfeld, which owned 90 of said shares of stock, did not agree

to said contract, nor were the executors of said estate authorized to transfer the stock thereof; that Carl Jungenfeld, a minor, who owned 70 of said shares, did not agree to said contract and was not bound thereby.

6. That the contract was *ultra vires* the De La Vergne Co.

7. That the contract was void, as against public policy.

8. That the contract was void because it *required* the De La Vergne Co. to increase its capital stock from \$350,000.00 to \$2,000,000.00.

It will be observed that no effort was made by the amendment of the answers to adopt or meet the suggestions of the appellate court respecting the possible abatement of the \$100,000 agreed to be paid by defendants; and upon the retrial no attempt was made by defendants to establish any such abatement.

Mr. De La Vergne having died the public administrator of St. Louis, in charge of his estate in Missouri, was substituted as a defendant in his place, and the causes having again been reached by the trial court, were ordered consolidated.

Thereupon, to make out their case, plaintiffs offered in evidence the written agreed statement of facts, upon which the case had been before tried, and upon which the Court of Appeals had held that plaintiffs were entitled to recover *prima facie* the amount of \$100,000; and also offered certain formal proof respecting De La Vergne's death and the action of the Public Administrator and of the Probate Court

of the City of St. Louis thereon. Upon this proof the plaintiffs rested their case.

Defendants read in evidence lengthy depositions taken in the cities of Chicago and New York; those taken at the former place were offered for the purpose of supporting the plea that plaintiffs had violated their covenant to refrain from entering the ice-machine business, and those taken at the latter place were offered for the purpose of establishing the plea that the De La Vergne Co. had neither authorized nor ratified the contract.

At the request of defendants the court made a special finding of the facts, in which it specifically finds that neither of these defenses were established. (Printed transcript, p. 407.) The court further finds the facts to have been as set forth in the agreed statement of facts, except as modified by the special finding, the only modification consisting of the foregoing findings in favor of the plaintiffs, and that there was no violation of their express covenant; and also finding that when the contract was entered into "the value of said Consolidated Company's assets and good will, *in the opinion of defendants*, exceeded its liabilities."

Thereupon the court entered judgment in favor of the plaintiffs for the full amount sued for, together with interest, and defendants sued out a writ of error to the Circuit Court of Appeals.

When the case was thus reached for the second time in the latter court the bench was composed of Sanborn and Thayer, circuit judges, and Phillips,

district judge, the latter sitting in the place of Judge Caldwell, who was sick. Judge Phillips, having tried the cases the first time in the circuit, did not sit in the appellate court; the case was therefore submitted before Sanborn and Thayer, judges.

On January 31, 1898, the judgment of the Circuit Court was affirmed, Judges Sanborn and Thayer agreeing upon every contention made and presented, in favor of the plaintiffs, but differing on the question of whether the contract in question was *ultra vires* the De La Vergne Co., and the judgment was therefore affirmed by a divided court. The opinion filed is very brief, and is as follows:

“Before Sanborn and Thayer. Per Curiam. The judges are divided in opinion upon the question whether or not the contract which is the basis of this action was *ultra vires* the De La Vergne Refrigerating Machine Company, and are of the opinion that the other questions presented should be determined in favor of the defendants in error. The judgment below is therefore affirmed by a divided court.”

The question of *ultra vires* was presented to the Circuit Court and to the Court of Appeals upon an act of the Legislature of the State of New York, making it illegal for a New York corporation to invest any of its funds in the purchase of stock of another corporation. This provision was adopted in 1848, and was in force when the De La Vergne Co. was organized in 1880; but the attention of those courts was not drawn to the fact, as is the attention of this court now, that in 1853 and 1866 amendatory

acts were passed expressly authorizing such purchases to be made. These provisions of the New York law will be referred to in the brief and argument.

The opinion of the Court of Appeals having been filed, the De La Vergne Co. secured a writ from this court ordering the case to be sent here for determination.

BRIEF.

I.

The contract involved in this cause was not *ultra vires* the De La Vergne Co.

(a) The subject-matter of the contract, the thing bargained for and purchased, was not stock of the Consolidated Co., but its tangible assets, its outstanding accounts and its good-will, subject to the payments of its debts, and the custody thereof until such payment, by the Illinois assignee.

German Savings Institution v. De La Vergne Refrigerating Machine Co., 36 U. S. App., 184; s. c. 70 F. R., 146.

(b) But if stock of the Consolidated Co. was the subject-matter of the purchase by the De La Vergne Co., the contract was not *ultra vires*, because the laws of the State of New York did not prohibit such purchase, as contended by the De La Vergne Co., *but on the contrary permitted it.*

Laws 1853, Chap. 331, Sec. 2.

Revised Statutes, N. Y. 1889, Vol. 3, p. 1961.

Laws of 1866, Chap. 838, Secs. 3 and 4.

Rev. Stat. N. Y., 1889, Vol. 3, p. 1967.

II.

The contract was not *ultra vires* as requiring or obligating the De La Vergne Co. to increase its capital stock.

The contract itself recites that the De La Vergne Co. was then considering the plan of increasing its stock, and by the contract it was left optional with said company either to make such increase and to pay plaintiffs with such increased issue, or to pay in money.

But even if the contract had required such increase and the De La Vergne Co. had no power to contract therefor and for the payment in such form, it will nevertheless be compelled to make compensation in some other form; in money.

Hitchcock v. Galveston, 86 U. S., 51.

Fort Worth City Co. v. Smith Bridge Co.,
151 U. S., 294.

State Board v. Ry. Co., 47 Ind., 407.

Parish v. Wheeler, 27 La. Ann., 449.

Morawetz on Corporations, Sec. 86.

Mo. Pac. Ry. Co. v. Sidell, 36 U. S. App.,
152.

Bensiek v. Thomas, 27 U. S. App., 765.

III.

The contract was not *ultra vires* the Consolidated Company because it was not a mere combination or coalition for the purpose of creating a monopoly or trust; but was a legitimate business undertaking.

Morawetz, Sec. 212.

Herriman v. Menzies, 115 Cal., 16.

Oil Creek Co. v. Pa. Trans. Co., 83 Pa.
St., 160.

Whitney Arms Co. v. Barlow 63 N. Y., 62.

Gasquet v. Carson City Brg. Co., 49 F. R., 496.

Camden Co. v. May's Ldy. Ry. Co., 48 N. J. L., 567.

IV.

The De La Vergne Company's execution of the contract is fully established.

(a) The answers denying its executions are not verified, and thereby the execution stands admitted. Rev. Stat. Mo., 1889, Sec. 2186.

(b) And such admission, by failure to verify, is not merely with reference to the formal or clerical execution, but includes the admission of substantial execution.

Rothschild v. Frensdorf, 21 Mo. App., 318.

Smith Co. v. Rembaugh, 21 Mo. App., 390.

Lithographing Co. v. Obert, 54 Mo. App., 240, (246).

(c) The testimony furnished by defendants themselves establishes a ratification of the contract by the De La Vergne Co., even if the president had no original authority to execute it. The corporation paid the services and expenses of the experts employed to investigate the affairs of the Consolidated Co.; the directors were acquainted with the execution of the contract and the disbursement of these moneys and made no objection thereto; the by-law of the defendant corporation gives the president unlimited powers to enter into contracts on its behalf; within five days after the contract was executed the

defendant company employed the Consolidated Co.'s former salesman, took charge of its former New York branch office and entered upon the business of selling machines built upon the Consolidated type or pattern.

(d) The agreed statement of facts *admits* the execution of the contract by both De La Vergne and the De La Vergne Co.

(Printed transcript, p. 39.)

V.

Where a contract admits of two constructions, one of which results in its validity and the other in its illegality, the former will be adopted.

Shore v. Wilson, 9 Clark & F., 397.

Noonan v. Bradley, 9 Wall., 394 (407).

Ormes v. Deuchy, 82 N. Y., 443.

Curtis v. Gokey, 68 N. Y., 304.

Sheffield v. Balmer, 52 Mo., 474.

Crittenden v. French, 21 Ill., 598.

2 *Parsons on Contracts*, (8 ed.) 168.

Jones on Construction of Contracts, Secs. 223, 224.

Bishop on Contracts, Sec. 392.

VI.

Jungenfeld's executors had power to assign the stock of that estate without an order of court. At common law the legal title to the personalty of the deceased passes to his executor or administrator, who has absolute control and dominion over the same.

with power of alienation; and the conveyance of the executor or administrator passes good title to the vendee or assignee.

Williams on Executors, (Ed. 1859) p. 269.

Woerner on Amer. Law of Administration,
Sec. 331.

3 Wait's Act. & Def., 244, and cas. ci.

Downing v. Garner, 1 Mo., 749, (reprint
537.)

Makepeace v. Moore, 10 Ill., (5 Gilm.) 474.

McConnell v. Hodson, 7 Ill., (2 Gilm.) 640.

Walker v. Craig, 18 Ill., 116.

Thornton v. Mehring, 117 Ill., 55.

In those States where Administration Acts have been adopted the rule is that an executor or administrator selling personalty without the sanction of the court possessing probate jurisdiction, makes himself answerable for the full value of the property; but his sale is not void—on the contrary his *bona fide* vendee obtains good title. Administration Acts are in aid, not in exclusion, of the common law powers of the legal representative.

Schouler's Executors & Administrators, (2
Ed.,) Sec. 346.

Smith's Probate Law, (Mass.) 111.

Harth v. Heddlestone, 2 Bay's Rep. (S. C.)
321.

Mead v. Byington, 10 Vt., 116.

Sherman v. Willett, 42 N. Y., 146.

Dickson v. Crawley, 112 N. C., 629.

Minuse v. Cox, 5 Johns., Ch. 441.

Wynns v. Alexander, 2 Der. and B. Eq.
Rep., 58.

An exception to this rule seems to exist in Missouri with respect to bonds and promissory notes. The cases of

Stagg v. Green, 47 Mo., 500.

Stagg v. Linnenfelser, 57 Mo., 337.

Chandler v. Stevenson, 68 Mo., 450.

Weil v. Jones, 70 Mo., 56,

merely go to this effect and no further.

State to use of Wolf v. Berning, 74 Mo., 87, merely holds that an administrator, *de bonis non*, may reclaim notes pledged by his predecessor, *for his own purposes*, with one having notice of that fact and of their true ownership.

These were the cases relied on in the lower court by defendants.

The Missouri Administration Act provides that executors or administrators may make compromises with and execute releases to debtors of the estate, *upon orders from the Probate Court*. Yet it has been held that a release *without such direction or sanction* will be good, the executor being personally liable for any loss caused by his lack of due care or prudence.

Mosman v. Bender, 80 Mo., 579.

Jacobs v. Jacobs, 99 Mo., 427.

And to the same effect, this court in *MacLay v. Equit. Life Ass. Soc.*, 152 U. S., 499.

VII.

The will of Jungenfeld in express terms authorized his executors "to sell, convey and transfer any part

or portion of my estate if they deem it for the advantage of those interested as legatees." Their assignment to defendants was therefore effectual, both under the will and by reason of their general legal power.

VIII.

Executors may convey title to shares in a corporation organized under the laws of a foreign jurisdiction. "The assignee of stock assigned by a foreign executor may compel the transfer thereof in the courts of the State where the corporation does business."

Middlebrook v. Merchant's Bank, 3 Abb. App., Dec. 295.

Same Case on Appeal, 41 Barb., 481.

Luce v. R. R., 63 N. H., 588.

Brown v. Gas Light Co., 58 Cal., 426.

Trecothick v. Austin, 4 Mason's C. C. Rep., 16.

IX.

The trustees of Jungenfeld's minor son also had power to assign and transfer the minor's stock to defendants. The will gave them general power to "manage, control and invest," and it was manifestly the intention of the testator to confer upon them the power of sale. Such power need not be granted by express words, but may be inferred where the intention is apparent.

18 *Am. & Eng. Enc.*, "Powers," 901 and cases collected.

Danish v. Dishbrow, 51 Tex., 235.

Orr v. O'Brien, 55 Tex., 149.

X.

There is no presumption of law that one acting in a trust capacity has the right to sell. Persons dealing with a trustee are put on inquiry and are bound to ascertain for themselves the extent of his power, and what title, if any, they will obtain by the trustee's conveyance.

German Saving Institution v. De La Vergne Ref. Mach. Co., 36 U. S. App., 184.

Duncan v. Jandon, 82 U. S., (15 Wall), 165.

Mason v. Wait, 5 Ill., 127 (135).

Brewer v. Christian, 9 Ill. App., 57.

Harmon v. Smith, 38 F. R., 482.

Shaw v. Spencer, 100 Mass., 382.

Wood's Appeal, 92 Pa. St., 379.

Godefroi's Law of Trusts, p. 360.

2 *Shouler's Personal Property*, Sec. 383.

Woerner on Am. Law of Administration, p. 1,077.

XI.

An agreement to transfer or assign stock is sufficiently performed by a delivery or an offer of certificates therefor assigned in blank.

23 *Am. & Eng. Enc.*, "Stock," p. 685 and cases there collated.

Keller v. Eureka Brick Mfg. Co., 43 Mo. App., 84.

XII.

The suggestion made below by defendants that because the Consolidated Co. had assigned all of its

property for the benefit of its creditors, and that therefore neither it nor its stockholders possessed any right which could be conveyed by the agreement of April 16, 1891, is without merit.

Under the Illinois assignment laws a right of reconveyance from the assignee existed on an adjustment with a majority in number and amount of the creditors; and it was this right or equity which defendants purchased and the agreement expressly so recites. In addition thereto defendants also secured the good will and trade of the Consolidated Company and the express covenant of its stockholders, plaintiffs herein. Defendants got all for which they bargained.

XIII.

The special finding of facts made by the court below is conclusive on appeal as to the matters found.

Stanley v. Albany Co., 121 U. S., 35.

Allen v. St. Louis Nat'l Bk., 120 U. S., 20.

Bridge Co. v. R. R. Co., 92 U. S., 315.

Where a cause is tried upon waiver of jury and the court makes a special finding of the facts, the only question upon the writ of error is the sufficiency of the facts found to support the judgment. The appellate court will not inquire whether the evidence was sufficient to support the findings.

Wile v. Farmer's State Bk., 17 C. C. A., 25;
s. c. 70 F. R., 138.

Minchen v. Hart, 18 C. C. A., 570; s. c. 72 F. R., 294.

Woodbury v. Shawneetown, 20 C. C. A., 400; s. c. 74 F. R., 205.

Nor is error in the findings of fact subject to revision, if there was *any* evidence upon which the findings could be made.

Hathaway v. Bank, 134 U. S., 494.

And special findings of facts by the court need only state the *ultimate facts*, not the evidence.

Mining Co. v. Taylor, 100 U. S., 37.

And a refusal of the trial court to find incidental facts, amounting only to evidence bearing upon the ultimate facts to be found, is not a proper subject of review.

Hathaway v. Bank, 134 U. S., 494.

XIV.

The refusal of the trial court where a jury has been waived to give abstract declarations of law, is not error.

Mercantile Mut. Ins. Co. v. Folsom, 18 Wall, 237.

XV.

The contract in question, providing as it did for a distribution of \$100,000 to the various plaintiffs, in the proportion in which they held stock in the Consolidated Co., amounted to a promise to each; and each was therefore warranted in bringing a separate

action for the proportionate amount due him. A general action would have been improper.

Parsons on Contracts, ——— ——— ———

Bliss on Code Pleadings, Sec. 3.

Taylor vs. Coons, 48 N. W., 123.

Finney v Brant, 19 Mo., 43.

Cross v. Williams, 72 Mo., 577.

XVI.

Neither party to a contract can rescind without placing the other in *statu quo*. Nor when sued for the purchase price successfully defend while retaining its benefits.

Ger. Savings Institution v. De La Vergne Ref. Mach. Co., 36 U. S. App., 184, and cases there cited.

Story on Sales, Sec. 427.

Bigelow on Estoppel (5 Ed.), 552.

3 Wait's Act. & Def., 483.

Mansfield v. Trigg, 113 Mass., 350.

Miller v. Tiffany, 1 Wall, 298.

Andrews v. Hensler, 6 Wall, 254.

Reeves v. Corning, 51 F. R., 774.

Union Nat'l Bank v. Matthews, 98 U. S., 621.

Washburn Mill Co. v. Bartlett, 54 N. W. Rep., 544.

ARGUMENT.

I.

We propose to discuss first the proposition advanced by the defendants that the contract in question was *ultra vires* the De La Vergne Company. This argument proceeds on the theory that the thing contracted for and bargained to be sold, and sold by the contract or agreement, was *stock* and not the right to secure the assets and the good will of the Consolidated Company, by appropriate acts and proceedings, on the part of the defendants.

This argument was accepted as sound by Phillips, J., upon the first trial, but was not sanctioned by the judgment of the Court of Appeals. On the contrary, that court holds that defendants did receive and did retain "the right of the corporation to its assets, subject to its debts, the good-will of its business, the suppression of the competition of the corporation and its stockholders, and by the valid assignment of more than three-fourths of its stock, the legal control of the corporation. These would seem to be all the benefits they could have received from the complete and technical performance of the contract. After the conveyance and covenant of April 16th, 1891, was executed and delivered the corporation was nothing but an empty shell. All its valuable rights and property had been vested in the De La Vergne Co., and the legal control of the shell itself was given to De La Vergne by the valid assignment of a majority of the stock of the corporation."

Thus the court construes the contract in the only fair way in which it can be construed, as a transfer and conveyance of all the assets of the Consolidated Company, by said company and all its stockholders, subject to the payment of its debts; and also the transfer and conveyance of its good-will, subject only to the same conditions; and the stock of this corporation, which had thus disposed of all its assets, and which by the covenant of all its stockholders was practically wound up and the shares thereby made valueless for all practical purposes, was merely assigned to defendant De La Vergne in order to enable him and his company more readily and completely to secure possession of those assets, and of the good-will and trade, from the legal custodian, the assignee. As stock, the shares in themselves possessed no value because by the contract itself whatever surplus of property the corporation might possess after its debts were paid, went, under the terms thereof, to the De La Vergne Co. and to the plaintiffs. That is, the assets of the company were transferred to the De La Vergne corporation and the \$100,000.00 of value which all the parties to this transaction believed the assets to possess over and above the indebtedness, went in certain proportions to the stockholders of the Consolidated Co.

It would be, therefore, a strained interpretation of the contract which would hold it to mean that the subject matter, the principal thing covered by it, was this stock, and not the assets and good-will, which latter were the things in which the De La Vergne Co. was mainly interested. And this was the view

of the Court of Appeals when it referred to the alleged offer of defendants to return the shares of stock in September, 1891, to "*whoever was legally entitled to them.*" "An offer to return them on September 12, 1891, if sufficient in form, would have been an idle ceremony. The defendants had undoubtedly then derived all the benefits of the performance of the contract by the Consolidated Co. and its stockholders, that they could ever derive. They still held the right to its assets, subject to its debts, the good-will of its business, and the covenant of its stockholders, which suppressed its competition. No doubt they had secured its customers and destroyed all possible competition. The return to the stockholders of the control over the empty shell of their corporation would have been a useless act. A merchant could not, by offering to return the empty box, successfully defend an action for the purchase price of a box of goods, on the ground that the box was defective when he received and sold the goods. * * *

And the defendants could not, after receiving and retaining for three months, the right of this corporation to its assets, subject to its debts, and the good-will of its business, and after destroying its competition, by offering to return the control of the corporation, shorn of its property and rights, defeat the action for the price they agreed to pay, because they did not receive legal assignment of a minority of its stock."

And it may be remarked here that when the Court of Appeals announced the foregoing, they had before them merely the agreed statement of facts; the

depositions since taken by the defendants themselves demonstrate beyond all room for question that what benefits the court said defendants had undoubtedly derived from the contract were in fact derived, and they have been retained by defendants ever since. And not only have defendants obtained the benefits of the contract and the only benefits they were interested in, and not only have they never released nor offered to release the plaintiffs from their covenant, but they have never offered to return even the stock received on April 25, 1891, nor one share of it.

We therefore submit that the question of *ultra vires* is not in this case, because the subject of sale by plaintiffs, and of purchase by defendants, was not the *stock* of the Consolidated Co., but its assets, good-will, and the agreement of its stockholders to remain out of the refrigerating business for a period of ten years. The stock was merely the vehicle or the handle by which the assets could better be controlled. It is folly to believe that defendants would have paid \$100,000.00 for the stock, *as stock*. We believe it was on this view that *Sanborn*, Judge, held that the contract was not *ultra vires*, because the following statutory provisions of New York were not before him at the time; which provisions, in our opinion, still greater simplify the controversy.

The De La Vergne Co. was organized under the general incorporation Act of New York, adopted in 1848. Section 8 provides as follows: "It shall not be lawful for such company to use any of their funds in the purchase of any stock in any other corporation."

When the case was submitted and argued below it was upon the impression that such continued to be the state of the law in New York upon this subject, until the time when the contract under discussion was entered into. Counsel for plaintiffs, relying confidently upon the position that the stock of the Consolidated Co. was not the consideration for which the defendants had agreed to pay the amount sought to be recovered, made no minute investigation into the laws of New York.

Since the affirmance of the judgment, however, by the court of appeals it has been discovered that such was not the law of the State of New York in April 1891. On the contrary, by the Laws of 1853 power was given to manufacturing companies, such as the De La Vergne Co. was, to acquire "*mines, manufactories and other property necessary for their business,*" the provision quoted from appearing in Section 2 of Chapter 333, of the Laws of 1853, said Section being literally as follows:

"The trustees of such company may purchase mines, *manufactories*, and other property necessary for their business, and issue stock to the amount of the value thereof in payment therefor; and the stock so issued shall be declared and taken to be full stock." (Statutes of 1889, p. 1961.)

And by an Act in 1866 it was further provided in New York that a manufacturing corporation might acquire stock in another manufacturing corporation and that the officers of the purchasing corporation might hold office as trustees of the corporation in which their company so acquired stock, in the same

manner as if they owned said stock individually. The Act to which we refer appears in the Laws of 1866 at Chapter 838, Section 3, and is as follows :

"It shall be lawful for any company heretofore or hereafter organized under the provisions of this Act, or the Act hereby amended, *to hold stock* in the capital of any corporation engaged in the business of mining, *manufacturing*, or transporting such materials as are required in the transaction of the business of such company, and for two years thereafter and no longer ; and also to hold stock in the capital of any corporation which shall use or manufacture material mined or produced by such company ; and the trustees of such company shall have the same power with reference to the purchase of such stock and issuing stock therefor, as are now given by the law with reference to the purchase of mines, manufactories and other property necessary to the business of mining, manufacturing and other companies. (Laws of 1853 *supra*.) But the capital stock of such company shall not be increased without the consent of the owners of two-thirds of the stock, to be obtained as provided by Sections 21 and 22 of the Act hereby amended."

"Section 4. When any such manufacturing company shall be a stockholder in any other corporation, its president or other officers shall be eligible to the office of trustee of such corporation the same as if they were individual stockholders therein."

Statutes of N. Y., 1889, Vol. 3, p. 1963.

All of the foregoing provisions were in full force and in full effect at the time when the De La Vergne

Company was incorporated and at the time when the contract out of which these actions arose was entered into.

They furnish ample power and authority to the De La Vergne Company to make the purchase of the rights of the Consolidated Company and its stockholders to the assets of the Consolidated Company, including the good-will of that company; and if it became necessary, or in the opinion of the De La Vergne Company it was necessary, to secure as a vehicle or means for better acquiring the custody of these assets, the shares of stock issued by the Consolidated Company, these same statutory provisions are amply broad enough to justify the acquisition of such shares. The language of the statute is that a corporation may purchase such "*manufactories and other necessary property.*" If, therefore, it be true, as urged by counsel for the De La Vergne Company that that company could not obtain possession of the property transferred to it by the conveyance of April 16, 1891, under the assignment laws of Illinois, excepting upon the petition of the assignor, and that therefore it was necessary to own the stock of the assignor, then under the statute just referred to such stock became "*other necessary property.*"

In the brief submitted on behalf of the De La Vergne Company in the Court of Appeals, it was asserted that the law down to 1891 continued to be in New York as it was in 1848, and therefore prohibitive, in express language, of the right of a corporation to use any of its funds in the purchase of stock in any other corporation.

Whether the foregoing statutory provisions subsequently adopted were omitted through inadvertence or because counsel were not aware of them, we do not know; but it is certain that they are conclusive upon the question of *ultra vires*, which is presented in this case, upon their theory that stock, and stock only, was the subject matter of the contract, and practically remove that question from the controversy.

Upon their aspect of the case counsel relied greatly upon the case of *Central Transportation Co. v. Pullman's Palace Car Co.*, 139 U. S., 24. But that was a case of a *quasi*-public corporation entering into a contract wholly beyond the scope of its power, and a contract which would result in an injury to the public. This court in the course of its opinion makes these facts prominent, saying:

“The plaintiff, therefore, *was not an ordinary*
 “*manufacturing corporation*, such as might, like a
 “partnership or an individual engaged in manu-
 “factures, sell or lease all its property to
 “another corporation. *Ardesco Oil Company v.*
 “*North American Oil & Mineral Company*, 66
 “Pa., 375; *Treadwell v. Salisbury Manufacturing*
 “*Co.*, 7 Gray, 393. But the purpose of its incorpo-
 “ration as defined in its charter and recognized and
 “confirmed by the legislature, being the transporta-
 “tion of passengers, plaintiff exercised a *public em-*
 “*ployment* and was charged with a duty of accom-
 “modating the *public* in the line of that employ-
 “ment, exactly corresponding to the duty which a
 “railroad corporation or a steamboat company, as a

“carrier of passengers, owes to the public, independent of possessing any right of eminent domain.
 “The *public nature* of that duty was not affected by
 “the fact that it was to be performed by means of
 “cars constructed and of patent rights owned by the
 “corporation, and from rights owned by others.
 “The plaintiff was *not a strictly private*, but a *quasi*
 “*public* corporation; and it must be so treated as
 “regards the validity of any attempt on its part to
 “absolve itself from the performance of those duties
 “*to the public*, the performance of which, by the
 “corporation itself, was the remuneration that it
 “was required by law to make to the public in return
 “for the granting of its franchise.”

This case, therefore, instead of being favorable to the position assumed by defendants, is authority supporting the validity of the contract assailed; for it expressly recognizes the right of a *private manufacturing corporation* to do that which is denied to one engaged in a public or *quasi*-public employment.

The ultimate facts found by the Circuit Court, and also by the Circuit Court of Appeals, to be established by the evidence, will be accepted by the Supreme Court of the United States.

Stuart v. Hayden, 169 U. S., 1.

Since, therefore, it is quite clear that the contract in question was not one which involved the purchase of stock by the De La Vergne Co., and since both the Circuit Court and the Court of Appeals have so found and declared, it will serve no useful purpose to analyze and consider in detail each of the cases which plaintiff in error cited in the brief filed in its

behalf before the Court of Appeals, and which undoubtedly will again be cited in this court. It is sufficient to say that they all follow the type of *Central Transportation Co. v. Pullman's Palace Car Co.*, and on investigation will be found to be cases involving contracts made by *quasi public corporations*, involving an abnegation by such corporations of a duty which they owe to the public. The cases will be found to affect the rights of such corporations as common-carriers, gas companies, banking corporations and the like; all of a semi-public character. The law declared in those cases has no application here, because the contract of purchase was not one involving the stock as the subject matter to be paid for.

We may, however, add that in recent years the tendency of the courts has been to abridge and limit the right of a corporation to set up the plea of *ultra vires* by way of defense to an executed contract, the benefit of which it has obtained and the benefit of which it retains. Particularly will such plea not be tolerated where it can only result in injustice.

Morawetz on Corporations, Sec. 100, and cases cited.

But we conclude the discussion of this point by reiterating that the plea of *ultra vires* is not in the case: first, because the contract was not one for the purchase of the Consolidated Co.'s stock; and second, because under the laws of New York the De La Vergne Co. had the power to invest in the stock of a manufacturing corporation such as was the Consolidated Co.

II.

Not having at this time the benefit of the brief to be presented on behalf of plaintiff in error and not knowing just what points in addition to the plea of *ultra vires* will be pressed in its behalf upon this court, we are compelled to anticipate that such points will again be presented as were relied upon before the Court of Appeals.

It was there contended that the contract was also *ultra vires* the De La Vergne Company upon the further ground that the contract required that company to *increase* its capital from \$350,000 to \$2,000,000, and to distribute among the plaintiffs \$100,000 of the increased issue.

An all-sufficient answer to this point is that the contract does not *obligate or require* the De La Vergne Company to make any increase of its stock. The preamble to the contract recites that that company "*is now considering a plan of so increasing the capital stock of said company as will enable said company to have a full paid capital of \$2,000,000.*"

But nowhere does the contract make it *incumbent* on the De La Vergne Co., or a part of the De La Vergne Company's contractual undertaking to increase its capital. On the contrary, it is left entirely optional with that company whether to increase its capital or to pay the consideration provided for by the contract in money.

That it was never intended that the De La Vergne Company should be understood as *agreeing* to in-

crease its capital stock for the purpose of carrying out this particular contract, is also made apparent by the testimony taken in its own behalf, which establishes that prior to the beginning of negotiations with these plaintiffs the stockholders of that company were already arranging for an increase of its stock. (Printed transcript, p. 191.)

And even if the De La Vergne corporation *had agreed to increase its stock* and to pay plaintiffs in stock of such increased issue, that would afford it no defense to these proceedings; for, if it could not be forced to pay in the precise manner agreed upon, it could still be compelled to do so in another form.

This point is squarely passed upon by this court in the case of *Hitchcock v. Galveston*, 86 U. S., 51. In that case the City of Galveston had agreed to pay Hitchcock for certain street improvement work in bonds to be issued by it for that purpose. It appeared that the city had no power to issue such bonds. *Held*, however, that though the contract in that regard was in excess of the municipal corporation's authority, that fact would not relieve it from making compensation to the plaintiff in money. This court said:

"The promise to give bonds to plaintiffs in payment for what they undertook to do, was, therefore, at farthest only *ultra vires*, and in such case, though specific performance of an engagement to do a thing transgressive of its corporate power may not be enforced, the corporation can be held liable on its contract. Having received benefits at the expense of the other contracting party it cannot object that it

was not empowered to perform what it promised in the mode in which it promised to perform."

To the same effect:

Fort Worth City Co. v. Smith Bridge Co.
151 U. S., 294;

State Board v. Railway Co., 47 Ind., 407;

Parish v. Wheeler, 27 La. Ann., 449.

And so the rule is stated to be in *Morawetz*, Sec. 86, that even where the contract of the corporation will not be specifically enforced because *ultra vires*, the corporation will nevertheless be liable in money damages where the contract has been performed by the other side.

Since, however, the De La Vergne Co. *did not engage* to increase its capital stock, further discussion of this legal proposition is unnecessary.

III.

It was also contended, and probably will again be contended, that if the contract in question be considered as a sale of the assets and good-will of the Consolidated Co., and not as a sale of its stock, then it was *ultra vires* the Consolidated Co.

In the Court of Appeals counsel admitted that a corporation finding its business no longer profitable, or desiring for any other reason to discontinue its business, may sell or dispose of its assets in lump as well as in parcels; but they argue that the courts have felt compelled in recent years to put their stamp of disapproval upon the legalization of the "modern

trust." Thereupon counsel having assumed that they were dealing with a case of modern trust, or the creation of a monopoly or pool, cited a large number of cases in support of the proposition advanced by them.

Conceding the correctness of their assertion we deny its application to the facts before the court. For a moment, however, we consider the cases to which they made reference in the court below.

People v. Chicago Gas Trust Co., 130 Ill. 268, was a case where a consolidation had been attempted between companies engaged in an employment or business of a *public character*. The court after a review of the facts before it held that they warranted the conclusion that the attempted consolidation was for the purpose of creating a *monopoly*.

The case of *Central R. R. Co. v. Collins*, 40 Ga. 582, involved a combination between railroads, engaged of course in a *quasi-public business*. Again the court's condemnation was placed upon the ground that the nature of the business in which the two corporations were engaged was of a public character, and again there was a case of attempted coalition, and not a case of purchase or sale.

In *Bishop v. American Preservers Co.* 157 Ill. 284, the court had before it an agreement which provided for the consolidation of *all the interests* engaged in a certain business into "*one giant combination*."

In *People v. Ballard*, 32 N. E., 54, the court held a sale by a domestic company to a foreign corporation, *organized through its preagreement with*

a number of non-resident trustees for the express purpose of stepping into its shoes, taking all its assets and carrying on its business, invalid as to non-assenting stockholders and the State; and held that the latter, the State, might compel the trustee who consummated the transfer to make restitution of the property to the corporation.

These cases sufficiently show the nature of the authorities which plaintiff in error relied upon in support of the contention that the contract in question was *ultra vires* and void as against public policy.

But what is there in the record in this case to indicate that the Consolidated Co, and the De La Vergne Co. were the only manufacturing corporations engaged in the building and selling of refrigerating machines, or that after insolvent proceedings by the Consolidated Co., and after that company had practically abandoned business, a sale by plaintiffs of whatever equity they yet had in the distribution of any surplus of the assets remaining after payment of their company's debts, would create a trust or monopoly? There is nothing to suggest that the price of refrigerating machinery would have advanced a penny or that the De La Vergne Co. would, after such purchase, have been in position to control that particular line of industry. On the contrary, it will be readily accepted as a fact, within common information, that in almost every manufacturing city and town in the country such machinery was then and now is being manufactured.

Referring again to *Morawetz*, we find that the author at Section 212 states the following as the rule upon this subject, deduced from the authorities cited in support thereof :

“But a corporation may sell out its assets and receive in payment *stock in another company*, having a fixed money value and convertible into cash at any time. The stock received under these circumstances is taken in lieu of money. It may be distributed in specie among those shareholders who are willing to accept it, but should be converted into cash and the proceeds distributed among those who do not consent to the arrangement.”

In the case at bar every stockholder of the Consolidated Company had consented to just such an arrangement.

And so on the other hand, *Morawetz* says, at section 218:

“The question of whether or not a corporation may purchase the whole concern of another company, depends upon the circumstances of the case. A corporation may purchase from another company as well as from an individual; and it may make the best bargain it can in order to obtain any property which is required for the purposes authorized by its charter. If, then, one company should desire to sell all of its fixtures and stock in trade, and another company should have a legitimate use for substantially the same property in carrying on its own business, the latter would be entitled to purchase the whole concern of the former.

"Under these circumstances it would not be an objection to the transaction that a portion of the property was not required by the purchasing company in carrying on its regular business, if the bulk of the property was purchased in good faith for authorized purposes and the remainder merely as a means of effecting an advantageous bargain.

"And there is no reason why the purchasing company should not pay for the property so obtained by assuming certain debts of the selling company instead of paying in cash."

On the question of what constitutes a *trust* or *monopoly* the Supreme Court of California recently, in *Herriman v. Menzies*, 115 Cal., 16, said: "A monopoly exists where all or nearly all of the article of trade or commerce within a community or district is brought within the hands of one man, or set of men, so as to practically bring the handling or production of the commodity or thing within such single control, to the exclusion of competition or free traffic therein, and anything else than this is not a monopoly. * * * An agreement, the purpose or effect of which is to create a monopoly is unlawful if it relates to some staple commodity or thing of general requirement or necessity, and not to something of mere luxury or convenience."

What is there, we ask, which would bring within the condemnation of the courts a purchase by one company, engaged in the manufacture of refrigerating machines, of all the assets and good-will of another? Granting that the purpose in the case at bar was to dispose of the rivalry and competition of the

Consolidated Company, does this create a trust or monopoly any more than if one grocer in a large community purchase the assets and good-will of his strongest competitor?

In conclusion and in connection with this point we add, in the language of the Supreme Court of Illinois, in *Bradley v. Ballard*, 55 Ill., 413: "When the contract is *executed* the doctrine of estoppel is applied for the purpose of compelling corporations to be honest in the simplest and commonest sense of honesty, after whatever mischief may belong to the performance of the *ultra vires* act has been accomplished."

Also in the language used by this court in the case of *Union National Bank v. Matthews*, 98 U. S., 621, quoting with approval the following citation from Sedg. on Stat. & Const. Constr., 73, to-wit: "Where it is a simple question of authority to contract, arising either on a question of regularity of organization or of power conferred by the charter, a party who has had the benefit of the agreement cannot be permitted in an action founded upon it, to question its validity. It would be in the highest degree inequitable and unjust to permit a defendant to repudiate a contract, the benefit of which he retains."

To the same effect:

Whitney Arms Co. v. Barlow, 63 N. Y., 62.

Oil Creek Co. v. Pa. Transportation Co., 83

Pa. St., 160.

Gasquet v. Carson City Brewing Co., 49 F.

R., 496.

Camden Co. v. May's Landing Ry. Co., 48
N. J. L., 567.

Morawetz, Sec. 689.

For these reasons it is respectfully submitted that the defendant corporation should not be permitted to plead that it exceeded its charter power, in acquiring the assets of the Consolidated Co. or that the Consolidated Co. exceeded its powers in disposing of the same; for whatever mischief the making of such a contract might produce, has been produced and cannot longer be prevented; though it is not apparent that any could have resulted or did result.

We also note in this connection a suggestion made in the court below by opposing counsel, that the contract in question was void because violative of a statute of New York passed during the legislative session of 1890, prohibiting *combinations* between corporations for the purpose of stifling competition.

With respect to this point it is sufficient to say that the Act referred to did not go into effect until May 1st, 1891, whereas the contract in question was made on April 16th preceding, in good faith, for a legitimate business purpose, and not in anticipation of the Act.

IV.

It was also argued that the De La Vergne Co. never authorized its president and principal stockholder to execute the contract in question and that it never ratified the same.

As opposed to that contention we refer:

1. To the fact that the answers in these cases, denying such execution, are not verified, and that thereby such execution of the contract stands admitted.

R. S. Mo., 1889, Sec. 2186.

And a failure to verify such answers does not admit merely the *formal* or *clerical* execution of the contract, but admits its *substantial* execution.

Rothschild v. Frensdorf, 21 Mo. App., 318.

Smith Co. v. Rembaugh, 21 Mo. App., 390.

Lithographing Co. v. Obert, 54 Mo. App., 240, (246).

2. The depositions offered by defendants, independently of defendant corporation's failure to put the execution of the contract in issue by verification, failed to establish that defense.

On the contrary, the testimony of the witnesses establishes that the experts, Guernsey and Waters, were paid for their investigations of the Consolidated Company's affairs by the *defendant corporation*; that they duly sent in itemized accounts setting forth in a general way the work performed and outlays incurred; which accounts, duly receipted, were on file among the defendant company's vouchers and papers, and the company's books showed these accounts as expended by it. (Printed transcript, pp. 304-305, 315-320.)

There was also produced and annexed to the depositions as exhibits, a mass of correspondence between Robert E. Jenkins, assignee, and the defen-

dant De La Vergne, *as president*, in relation to this matter; also the admissions of at least two of the De La Vergne Company's trustees or directors, that they became acquainted with the fact of the making of the contract shortly after its execution and of the payments made to Waters and Guernsey, and that they raised no objections thereto, except that one of them complained of the *amounts* charged by one of the experts for his services.

And there was the further evidence that on May 1, 1891, therefore within five days after the certificates of the Consolidated Co. stock had been delivered, a contract was entered into between the De La Vergne Co. and one Koenigsberg, a former salesman and Secretary of the Consolidated Co., whereby he agreed to serve *the De La Vergne Co.*, for a period of three years in connection with the sale of machines of the Consolidated type or pattern, and agreed to serve *the De La Vergne Co. or the Consolidated Co. "as he might be directed to do."* (Printed transcript, p. 284).

There was also evidence to the effect that this contract *was kept a secret* until after the defendants had repudiated liability to plaintiffs in September, and that then there appeared, *at the expense of the De La Vergne Co.*, advertisements in Koenigsberg's name in connection with the Consolidated machines; also that Koenigsberg retained the former New York branch office of the Consolidated Co., the De La Vergne Co., paying not only the office rent but paying all expenses incurred in Koenigsberg's ostensible business. There were other details, all tending

to show further connection of the De La Vergne Co. with the contract, which it is unnecessary to set forth minutely. It is sufficient to say that the New York depositions, read by defendants, confirmed what the Court of Appeals said on the first appeal: "The defendants had undoubtedly then (September 12, 1891), derived all the benefits of the performance of the contract of the Consolidated Co. and its stockholders that they could ever derive. They still held the rights to its assets, subject to its debts, the goodwill of its business, and the covenant of its stockholders which suppressed its competition. *No doubt they secured its customers* and destroyed all possible competition. The return to the stockholders of the control over the empty shell of their corporation would have been a useless act."

3. The agreed statement of facts was entered into years ago when the matters of fact were still fresh in the minds of the parties, and this agreed statement sets forth in unambiguous language that the defendant company entered into the contract in question. At page 39 of the printed transcript (42 of the manuscript) appears the following admission: "That on the 16th day of April, 1891, the defendants De La Vergne and the De La Vergne Refrigerating Machine Co. and said Consolidated Ice Machine Co. and said several plaintiffs, *did enter into a contract in writing, of which the following is a copy:*" whereupon follows the contract thus admitted to have been executed by defendant company.

Thus the corporation's execution of the contract

stands admitted in solemn form; and the depositions not having established any violation of the contract on the part of the plaintiffs, and the court below having specifically so found, and the depositions having failed to show an abandonment of the contract, and the court below having specifically so found, the case rests again as it did in the beginning, upon the facts set forth in the agreed statement and upon none other.

V.

Plaintiffs have always contended that they sold, and that defendants bought, whatever right or interest plaintiffs and their corporation had in the assets of the Consolidated Co., and in its good will and trade after payment of its debts; and that for this and for the covenant of plaintiffs, defendants agreed to pay them the stipulated sum of one hundred thousand dollars. Defendants on the other hand contend that what they bought was *stock*, and that this stock was not merely "*thrown in*" with the assets as a further assurance of title, and that therefore the contract was *ultra vires* the De La Vergne Co. Assuming for the moment that if the stock was *the* consideration that the contract was void (which proposition, however, we deny), yet it is a familiar canon of construction that if an agreement is susceptible of two interpretations, one of which makes it legal and the other of which makes it illegal, that one will be adopted which upholds rather than destroys the contract.

Shore v. Wilson, 9 Clark & F., 397.

Noonan v. Bradley, 9 Wall, 394 (407).

Ormes v. Deuchy, 82 N. Y., 443.

And the many other authorities cited in the brief under Point V.

The interpretation given by us to the contract has been given it also by the Circuit Court and by the Court of Appeals. It is therefore fairly, if not conclusively, open to that interpretation of its meaning and purpose. Under the doctrine of the foregoing authorities that meaning should prevail rather than the one insisted upon by the defendants, which would destroy its legal effect.

VI.

The executors of the Jungenfeld estate had such title in the stock belonging to their decedent that their assignment of it passed title to defendants, if we view the case on the theory that the stock was the subject of the transaction.

It is well settled that the legal title to personal property of a deceased vests at common law in his legal representative, and that such representative is unrestricted in his right to dispose of the same to a purchaser in good faith.

In *Woerner on American Law of Administration*, at Section 331, the authorities are collected and the rule deduced from them is announced as follows:

"Since the legal title to all personal property descends to the executor or administrator, a sale or conveyance by him passes a good title to the vendee

and to the assignee and vendee of negotiable notes. If the executor misapply the assets he commits a *devastavit*, and creditors, heirs and legatees must look to him personally and to his sureties for indemnity."

And at Section 175 the same author says :

"But an executor or administrator has at common law power to dispose of and alien the assets of the decedent; *he has absolute power over them for this purpose*, and they cannot be followed by the creditors of the deceased. And he may convert them to his own use, thus making himself chargeable with the amount, and subjecting those converted to the same incidents and liabilities as if they had never belonged to the estate of the deceased."

This question arose early in Missouri, where the executors in question were appointed and acted, in the case of *Downing v. Garner*, 1 Mo., 749, (p. 537 of reprint). The dispute there arose between the transferee of a slave from an administrator and the purchaser under a writ of execution against the administrator. The Supreme Court of Missouri disposes of the question as follows :

"Very many points have been raised which need not be particularly noticed. Those which go to the merits of the action are: First. *Have administrators the right or power to sell or dispose of the personal assets of the intestate so as to pass the title to purchasers, distributees, etc., clear of the claims of creditors, etc.?* * * * As to the first point, the claims or demands of creditors, distributees and residuary legatees are personally against executors

or administrators, and if they misapply the assets, *over which they have an absolute power of alienation*, they commit a *devastavit* for which their own property and that of their sureties is responsible. See *Cook's Report*, 205-6; *Bay's Report*, 321; *Taller's Laws of Executors*, 239-41-44."

It is true that many of the States of the Union have modified the common law rule by legislative enactments upon the subject of administration. In some the effect has been to deprive executors and administrators altogether of the right of making disposition of the property coming to their hands, while in others the effect of the statutory provisions has been to leave the administrator still free to dispose of the *personalty* coming to him, without an order of court, but to hold him liable in such case for its full value, as at common law. In other words, he may seek the advice of the court by obtaining an order of sale and be protected thereby against personal responsibility.

Thus in *Makepeace v. Moore*, 10 Ill. (5 Gilm.), 474, the court, speaking of the power of an administrator to sell without leave of court, says:

"If he disposes of the note without the direction of the court to do so, he is chargeable with the amount due upon it; if he acts under the sanction of the court he is only to be charged with the amount he actually received."

The same rule was made in:

Walker v. Craig, 18 Ill., 116.

Thornton v. Mehring, 117 Ill., 55.

And even in those States where it has been held that statutory provisions are intended to cut off the right of the legal representative to sell personal property excepting upon an order of court, it has also been held that a sale without such order is *not void* but only voidable. Such is the decision of the Court of Appeals in Missouri in the case of *Boeger v. Langenberg*, 42 Mo. App., 7 (p. 13), where it is said :

“But such a sale or pledge is perhaps only *voidable* and would be treated as valid until called in question by the creditors, next of kin, or other persons interested in the estate.”

In North Carolina an Administration Act has prevailed for many years quite similar to that prevailing in Missouri. The Act provides that personal property of a deceased should be sold at public auction, after public advertisement, and upon an order of the county court for that purpose *first having been obtained*. Certain executors disposed of personal assets *at private sale and without an order of court*. The title of the purchaser being attacked by one of the distributees in the case of *Wynns v. Alexander*, 2 Dev. and Battle's Eq. Rep., 58, the court passing upon the question said :

“The executor or administrator might, before the passage of the Act, have sold *bona fide* the goods and chattels of the testator or intestate ; the legal title was in him and an honest purchaser from him would also have acquired a good title. The common law on this subject is not repealed by this Act. The statute is only directory, which, however, it would

be well always to follow; for if the executor or administrator fails to obtain as much at private sale as would have been got at public vendue he would be bound to make good the deficiency out of his own pocket."

So also in Vermont, in *Mead v. Byington*, 10 Vt. 116, where administrators sold personalty at private sale, without an order of court, for less than its appraised value, the Supreme Court says:

"The administrator is entitled to an order of the Probate Court to sell at public or private sale, yet we do not think such an order indispensable to his protection against losses if he acts with due judgment and discretion and in good faith. If he so acts it must be indifferent to the estate whether he sells at private sale, with or without the order for that purpose."

And accordingly, on exceptions to their settlement, the administrators were allowed credit in their accounting for the difference between the appraised value of the property and the proceeds realized, notwithstanding they had acted without an order.

In South Carolina the statute provided "that when it should be requisite to make sale of the intestate's personal estate for the payment of debts, for a division, or to prevent the loss of perishable articles, application shall be made to the court of the county, or ordinary, *for an order of sale*; whereupon the court or ordinary may grant or refuse such order."

In *Harth v. Huddleston*, 2 Bay's Rep., 321, an

action *in trover*, wherein defendant claimed title under a bill of sale from the administrator who had sold the property in controversy to him, *without an order of sale*, it was held that there was nothing in the "*Executors Law*" which took from the administrator the power to dispose of goods and chattels, at his peril in case of loss.

In *Dickson v. Crawley* (1893), 112 N. C., 629, a private sale by an administrator without an order of court was held to pass title, the court saying:

"A private sale of a chose in action by an executor or administrator, if made in good faith, is valid, although, says Daniel, J., it would be well to follow the direction of the statute; for, if the executor or administrator fails to obtain as much at private sale as he would have got at public vendue, he or they would be bound to make good the deficiency out of their own pockets."

SCHOUTER, in his work on *Executors and Administrators* (2 Ed.), 346, announces his conclusions on this subject as follows:

"Personal property of the deceased, notwithstanding such statutes, is commonly sold by executors or administrators at their own discretion without any order of court; and if the representative acts in good faith and sound discretion the interests of no person concerned can be injuriously affected.

* * * The executor or administrator, however, makes a sale at his own risk where such an order is not previously obtained; and the advantage of procuring one is apparent, where it is probable the

property cannot be sold for its appraised value and the administration may be greatly affected by the amount realized; for, complying with the terms of his order the executor's or administrator's responsibility is limited to duly accounting for the proceeds of the sale."

Upon these authorities it is submitted that viewing the transaction as a sale of stock the assignment by the executors of the deceased Jungenfeld was sufficient to pass title to defendants.

In the court below counsel for defendants cited certain Missouri cases apparently, but only apparently, in conflict with the foregoing; but on an examination of those cases it will be found, if they are cited here, that they relate wholly to transfers of negotiable paper; with respect to which an exception to the rule prevails in Missouri. And those cases are based upon the peculiar language of a local statute, touching the transfer of *bonds and notes*, are in conflict with the authorities elsewhere, and cannot properly be held to apply to other property.

VII.

But without any resort to the law to ascertain the ordinary legal rights and powers of legal representatives, the transfer and assignment of the stock by the executors vested good title in defendants, because in the will nominating them they are expressly given "*full power to sell, convey and transfer any part or portion of my estate, if they deem it for the advantage of those interested as legatees.*"

Under this power, and independently of any authority conferred by the general law, defendants became vested with a good title to the Jungenfeld stock by virtue of the assignment thereof by the executors. Thus, if the transaction be viewed as a stock transaction, defendants cannot contend on meritorious grounds that they did not become well vested with the title to the particular shares under discussion.

VIII.

But, contended defendants in the courts below, even though executors may sell and convey the title of the decedent in shares of stock, yet they possess no such authority with respect to shares in a corporation organized under the laws of a foreign state.

In this contention, however, we submit they are in error. The precise question is exhaustively considered and discussed in the case of *Middlebrook v. Merchant's Bank*, 41 Barb. (N. Y.), 481.

The facts there were that one Robert Middlebrook died in Connecticut, the owner of one hundred shares of stock in the Merchants' Bank of New York. Administration was had on his estate in Bridgeport, Connecticut, and the executors there appointed assigned fifty of the shares to plaintiff. When plaintiff presented his certificate and offered to surrender it for one to be issued to himself, the officers of the bank refused to recognize his right thereto, taking the ground that the foreign executors could pass no title to the stock. Plaintiff there-

upon brought suit to compel such transfer, and the Supreme Court, in determining the case, said :

"The ground upon which the bank refused to permit the transfer to the plaintiff and the ground upon which the counsel of the bank upon the argument insisted it was justified in so refusing, was substantially that the bank was not obliged to recognize the title of the foreign executor. In this I think that the bank and its counsel were mistaken. The cases in this State only show, I think, that our courts will not recognize the rights of a foreign executor or administrator *to sue* in the courts of this State, under or by virtue of his foreign letters testamentary or of administration. I suppose there is no reasonable ground for saying that the title to the testator's bank stock in this State, as well as to all his chattels and personal estate, wherever situated or being, vested in his executors, either by the will on his death or issuing of letters testamentary to them, or both. *Having title to the bank stock in question they had a right to assign it to the plaintiff and to execute the power of attorney authorizing the transfer to him.* I do not know that it has ever been questioned but that even a foreign statutory bankrupt proceeding passed the title to the bankrupt's property here as between the bankrupt and his assignees. The cases in this State only go to show, I think, that the plaintiff's assignors, as Connecticut executors, could not have maintained an action against the bank for refusing to permit them to transfer the shares. Perhaps you may say that the bank was not legally bound to permit the transfer on the demand of the executors *before the assignment to the plaintiff*, be-

cause the executors could not, as foreign executors, bring an action for such refusal in their own names as such executors; but if the executors could and did execute the power of attorney for its transfer on the transfer books, the bank, I think, was bound to recognize the plaintiff's title to the stock, and *his* right to have it transferred to him on the books; and for refusing to permit such transfer I think the bank is liable in this action brought in the name of the assignee of the executors. It is utterly immaterial whether the assignment to the plaintiff and the power of attorney for the transfer of the stock were executed in Connecticut or in this State."

From this judgment so rendered against it the bank appealed, and the case coming before the New York Court of Appeals, was there affirmed; the court stating their views (*Middlebrook v. Merchants' Bank*, 3 Abb. App. Dec., 295), as follows:

"By the law of the testator's domicile his executors succeeded to the ownership of his personal property. Under an authority derived from him, and in the exercise of a *jus disponnendi* inherent in them as successors to his title, they transferred the stock to the plaintiff. He produced to the bank the appropriate evidence of his interest and requested permission to enter the transfer on its books on the surrender of the original certificate. *His right as owner was perfect, and his demand was wrongfully refused.* There was no occasion for taking out letters testamentary here, for either *the passing of title to the stock, or of satisfying the scruples of defendants.*"

The same question came before the Supreme Court of New Hampshire, which, in the case of *Luce v. R. R. Co.*, 63 N. H., 588, announced the following views:

"Letters of administration confer no extra territorial authority as matter of right; hence the power of an executor or administrator is limited to the State or country of his appointment, and being so limited the general law is that he cannot sue or defend in his representative capacity in a foreign jurisdiction—not, however, for want of title to the assets of his decedent situated in such foreign jurisdiction, but because of his personal incapacity to enforce it. And it is upon this ground of title that it has been so often decided by courts of the highest authority, that, in the absence of ancillary administration or statutory prohibition, the domiciliary administrator or executor has authority to take possession of and remove the goods or effects of the decedent in another jurisdiction, or to collect a debt due from a debtor residing therein if voluntarily given up or paid, and give a good acquittance and discharge therefor. *Soo, too, he may sell and assign stock in a foreign corporation*, and the corporation may voluntarily consent to its transfer by accepting the outstanding certificate and issuing a new one to the purchaser. *Hutchins v. State Bank*, 12 Met., 421, 426, 427."

It is therefore apparent that the objections urged by defendants, namely, that Jungenfeld's executors could not transfer title to the Consolidated Company's stock, because that company existed under incorporation in Illinois, is devoid of any merit.

IX.

Jungenfeld's will also conferred upon the trustees of his minor son power to sell the interest of the latter in the stock of the Consolidated Co. The will provides that the trustees shall "*manage, control and invest*" the minor's estate. This language is sufficiently broad and comprehensive to clothe them with the power of disposition. Such power need not be conferred by express words, but will be implied, if it be manifest that such was the intention of the testator.

18 Amer. & Eng. Enc., "Powers," 901,
and cases there collected.

Danish v. Disbrow, 51 Tex., 235.

Orr v. O'Brien, 55 Tex., 149.

X.

But whether the executors or trustees had power to sell, or had no such power, becomes wholly immaterial when we consider that defendants were dealing with persons occupying a trust relation to the stock. Defendants knew they were purchasing from trustees, whether their purchase consisted of assets or consisted of stock, and it is an elementary rule that persons dealing with trustees are put upon their inquiry. They are bound to ascertain and to know the extent of the trustee's power. No implied warranty of title or of power exists in such cases.

"There is no presumption that a trustee has the

right to sell corporate stock like an executor. One dealing with him is put on inquiry."

Duncan v. Jandon, 82 U. S. (15 Wall.) 165.

"Purchasers from trustees are themselves bound to see that the sale is not a breach of trust or that some act done in the course of it will not prevent them from enforcing the contract."

Godefroi's Law of Trusts, 360.

"Notice of the extent of the trust is by all the authorities held to impose the duty of inquiry as to its character and limitations, and whatever is sufficient to put a person of ordinary prudence upon inquiry is constructive notice of everything to which that inquiry might have led."

Shaw v. Spencer, 100 Mass., 382.

"The party taking stock on pledge from such a trustee deals with it at his peril, for there is no presumption of a right to sell it as there is in the case of an executor."

Wood's Appeal, Pa. St., 79.

The case of *Mason v. Wait*, 5 Ill. 127, (135,) a suit upon a promissory note, is quite to the point. Among other defenses it was pleaded that the note was given on a purchase of certain land from plaintiff as the guardian of her minor child, and that plaintiff had no power to make the sale. The court overruled this plea, saying:

"The seventh plea relies upon a *suppressio veri* as a defense. The basis of this defense is fraud, and while the plea attributes a knowledge of the want of power to the plaintiff, and a concealment of it,

yet it does not appear that the plaintiff pretended to sell in any other right than as guardian, nor that she pretended to have any other title than that of the ward. There are no false representations alleged. The power and appointment of a guardian are matters of law and of record, which those dealing with them may and should inquire into, and, I think, are bound to notice to the extent to which the doctrine of *careat emptor* should apply with us. The appointment is recorded in the Probate Court; the powers are such as the law confers. This much the defendant should examine. *If she pretends to go beyond this they should call for her authority. If they deal without it, I think they ought to be concluded by their own negligence.*"

Such was also the view of the Court of Appeals in these cases:

"If it is said that the defendants were not aware that the assignments made by the executors and trustees were not authorized by orders of the Probate Court, and hence that they were excused from rejecting them and returning the property which they had received, the answer is that it was as easy for them to ascertain that fact in May and June of 1891, when these parties could have been placed *in statu quo*, as it was on April 10, 1893, after they had derived all the benefits of the contract, when they first raised the point by their answers in this case.

Moreover, the rule *careat emptor* governs them. They knew the law. They had notice of all the facts that the diligent inquiry of a reasonably prudent man

would have discovered, and they had reserved to themselves by the contract sixty days after the assignments were delivered to examine them and decide upon their sufficiency before they were required to pay."

German Savings Institution v. De La Vergne Refrigerating Machine Co., 36 U. S., App., 184.

In the case at bar, defendants voluntarily chose to contract with Messrs. Rassieur and Lingensfelder, in their capacity of executors and trustees. They joined with the corporation in which they held stock in such representative capacity in disposing of whatever right, title or interest they could convey. They are described in the instrument as executors and as trustees and they signed in that character. The assignment on the back of the certificates of stock is likewise so signed. Clearly, then, under the authorities it was for the defendants to ascertain the extent of the power of these executors and trustees and to determine whether they would negotiate or deal with them. It was their duty, too, to make these inquiries before executing the contract and accepting the stock and to determine whether they would acquire anything by the conveyance, and not afterwards.

It must be now assumed that defendants did make such inquiries and concluded to accept the conveyance for whatever it might be worth. After having received and retained such rights as these trust representatives could convey, it does not lie in the mouths of defendants to now assert that they lacked the power of making conveyance. And it may fairly

be urged that defendants having made every investigation that it was their duty to make, and having ascertained just how extensive or how limited were the powers of the trustees, were willing to take their chances on the legal effect of their act. They certainly got all for which they bargained, the stock certificates of the Jungenfeld estate and of the Jungenfeld minor, properly assigned by the executors in the one case, and by the trustees in the other.

In the language of Judge WOERNER, in his work on *Administration*, at page 1077: "The principle of *caveat emptor* is therefore strictly applicable. The obligation it imposes upon the purchaser is that he must exercise his own judgment upon what he can reasonably exercise it pertaining to the thing sold. Hence in sales by executors and administrators there is no warranty, express or implied."

XI.

Defendants have heretofore also urged that no transfer of the stock was made because some of the certificates were merely assigned in blank, and because the contract speaks of *stock* and not of stock certificates. We submit that this argument is ill-founded.

An agreement to transfer or assign stock in a corporation is sufficiently performed by delivery or offer of certificates therefor assigned in blank.

23 *Am. & Eng. Enc. "Stock,"* p. 685, and authorities there collated.

Keller v. Eureka Brick Mfg. Co., 43 Mo. App., 84.

Besides, it does not appear that any such objection was made when the certificates were delivered. On the contrary, the certificates of stock so assigned in blank were retained and have been retained ever since. They have been produced in court, but only as exhibits on behalf of defendants and are subject to withdrawal by them.

XII.

The argument was also advanced by defendants, and it may be renewed here, that plaintiffs had nothing of interest in the assets of the Consolidated Co. after its assignment for the benefit of creditors, whether legal or equitable, which they could convey. And upon this premise defendants argued that nothing passed to them by the conveyance embraced within the contract.

The assertion cannot avail defendants because all of the facts were known to them at the time and are set forth, not once but repeatedly in the agreement itself. There was no concealment of the true state of affairs, nor any attempt to magnify the assets, which were the subject of the transaction. That the Consolidated Company's tangible property was in the hands of an assignee was well known, for defendants expressly purchased the same *subject to the payments of the debts of the Consolidated Company and subject to the legal custody of the same in the hands of the assignee, as the representative of the creditors.*

That these assets, without any regard to the goodwill, and without any regard to the covenant of the

plaintiffs set forth in the contract, had a value in excess of the obligations of the company must necessarily be assumed; for the record discloses that before defendants entered into the contract and made the purchase, they made the most painstaking investigations and examinations into the condition of the Consolidated Company's affairs, employing expensive experts for that purpose. But if the value of the assets was purely speculative, and not real, that fact was as well known to defendants on the 16th of April, 1891, as at any time since. Whatever they bargained for they have received, so far as they cared to receive it. If they were content with the trade and good-will of the Consolidated Company, which they secured (but which fact they attempted to conceal), and with the covenant they had received from the plaintiffs, whereby they were precluded from re-entering into the field of business for ten years, and were willing to let go the manufacturing plant, machinery and other tangible property, rather than liberate the same from the assignee by paying the Consolidated Company's debts, or by compromising with the creditors and thus making the assets still more valuable to themselves, that was their own affair; and for their failure to fully realize on their contract, as it was in their power to do, the plaintiffs should not be made to suffer. They fully conveyed and transferred to defendants all that they agreed they would, and they fully and faithfully in every other respect performed their contract. Defendants should be compelled to perform it on their part.

The contention that by the assignment the title to the property passed to the assignee and that there-

fore nothing was left in the corporation or its stockholders to convey, is, to a certain extent, but only to a certain extent, true; but defendants are bound to admit that under the laws of Illinois this property could have been re-acquired from the assignee in exactly the manner set forth in the contract. Manifestly when defendants made the purchase they intended by an acquisition of the claims of creditors, by purchase on favorable terms or by payment when no other terms were open, to secure such reconveyance of the assets from the assignee. Their failure to do this is a matter over which plaintiffs had no control.

In this connection defendants also maintained that the effect of the agreement under discussion was an attempt by plaintiffs to sell the assets of their corporation and to leave the creditors unprovided for and unpaid. The agreement itself contradicts such an assertion. The agreement provides that the sale is subject to the rights of creditors. And it was only the surplus, which might remain after every obligation was extinguished, that was to be divided up amongst the plaintiffs as the sole owners of stock of their company, in the proportions in which they held the same. This they had the lawful right to do, because in such surplus no one was interested but themselves. The effect of that part of the agreement was to wind up the Consolidated Co. and to make the shares of stock, as stock, wholly valueless; and of this fact defendants were necessarily aware by the terms of the agreement itself.

XIII.

Notwithstanding the findings of the Circuit Court defendants insisted in the Court of Appeals that the record showed a violation by plaintiffs of their covenant to refrain for ten years from re-entering the business of making or vending refrigerating machines, and also that the record showed an abandonment of the contract.

Both contentions were determined adversely to defendants in the special finding of facts made at their request.

It is well established practice that where a case is tried, as was this consolidated cause, by the court without a jury, its findings upon questions of fact are conclusive in the federal appellate courts.

Stanley v. Albany Co., 121 U. S. 535;

Allen v. St. L. Natl. Bank, 120 U. S. 20;

Bridge Co. v. R. R. Co., 92 U. S. 315.

And when a court to which the cause has been so submitted has found the facts specifically the only question open *upon a writ of error is the sufficiency of the facts found to support the judgment*. The Appellate Court will not inquire whether the *evidence* was sufficient to support the *findings*.

Wile v. Farmers State Bank, 17 C. C. A., 25; s. c. 70 F. R. 138;

Minchen v. Hart, 18 C. C. A. 570; s. c. 72, F. R. 294;

Woodbury v. Shawneetown, 20 C. C. A. 400; s. c. 74 F. R. 205.

Nor is any error in findings of fact subject to revision if there was *any* evidence upon which such findings could be made.

Hathaway v. Bank, 134 U. S., 494.

The mere statement of these propositions is sufficient to show their application to the case at bar, and the evident impropriety of the endeavor of counsel to have this court review the facts as a trial court.

In this connection counsel also argued, and may argue again, that the court below erred in failing to make certain findings requested by them. A mere glance at the findings so requested (printed transcript, p. 348 et seq.) will show that they were not findings of ultimate or final facts but a mere recital or rehearsal of evidential facts from which certain conclusions could be reached.

We submit that the court below properly declined to find the facts in that sense which would have required it to set out the *evidence* in the case.

“The refusal of the trial court to find the immaterial or incidental facts amounting only to evidence bearing on the ultimate facts found, is not a proper subject of review.”

Hathaway v. Bank, 134 U. S. 494.

“A special finding of facts by the court need only state the *ultimate facts*, not the evidence.”

Mining Co. v. Taylor, 100 U. S. 37.

These ultimate findings the court made, and this is all which defendants could justly demand.

Therefore, we repeat, it is unavailing for defendants to claim on appeal that plaintiffs are not entitled to recover because of the assertion made by them, and found to be untrue by the court below, that certain of the plaintiffs had violated their covenant, or that all of the plaintiffs had acquiesced in an abandonment of the contract.

And if this court were disposed to examine the record it would find that the trial court's conclusions were the only conclusions which could be reached from a consideration thereof.

XIV.

It was also claimed that the trial court erred in refusing to pass upon or to declare ten abstract propositions of law prayed for by plaintiff in error. (Printed transcript, p. 383.)

We sufficiently anticipate this objection, if again made, by merely referring to the case of *Mercantile Mutual Ins. Co. v. Folsom*, 18 Wall, 237, wherein it is held that where a case is tried before the court, upon a waiver of jury, its refusal to grant abstract conclusions or declarations of law does not constitute error.

XV.

The contract in question having been executed by and on behalf of eight several interests it was claimed that it was thereby made joint and not several; that therefore the actions forming this consolidated cause were improperly brought; that there

should have been one joint cause instead of separate causes in favor of eight plaintiffs.

It appears from the petitions or declarations in these causes that the promise set forth in the contract is one which was made to the several plaintiffs separately, and this also appears from the contract itself. In other words, the contract contains the provision that defendants should, within sixty days after the receipt of the certificates representing the Consolidated Company's issued shares of stock, turn over, deliver and transfer to each of the plaintiffs respectively, a certain portion of the \$100,000 of money or of stock in the De La Vergne Co., as the defendants may elect. While the contract was under one cover and in one writing it is apparent from its face that it was a several contract between the De La Vergne Co. and De La Vergne on the one hand and each of the eight plaintiffs on the other. The test stated by PARSONS, in his work on *CONTRACTS* (Book I, * p. 19), for determining whether a contract of a number of persons is joint or several, is as follows:

"The nature, and especially the entireness of the consideration is of great importance in determining whether the promise be joint or several; for if it moves from many persons jointly the promise of payment is joint; but if from many persons and from each severally, then it is several."

IN BLISS ON CODE PLEADINGS, at Section 63, the test is stated in the following language:

"The general rules are, first that a right given to two or more persons without words of severance,

creates a joint and not a several liability ; but second, if a contract, though made with more than one, contains a stipulation to pay a certain sum to each, promisee individually, or to do an act for the benefit of each one, it creates a several right."

Applying these two rules to the cause before the court it is clear that the objection made is insufficient. While the petitions set forth that all of the stockholders of the Consolidated Company sold their right, title and interest in the assets of the company, they also set forth that they were to transfer their several certificates of stock in said company to the defendants, to place them in more complete control of said assets. Such being the case, the consideration moving from the plaintiffs was not entire. It moved from many persons, *but from each separately*, and hence the contract must be deemed to have been a several contract.

Again the contract shows that the defendant company promised plaintiffs a consideration, which by the language of the contract was to go to them severally in certain proportions. The contract, it is true, was made with more than one person, but the act to be done by the defendants was to be done for the benefit of each stockholder of the Consolidated Company, and hence the contract created a several and not a joint right.

The following cases all support this view and announce that where an agreement is made by several, but the consideration is to be divided between them, several actions will lie and a joint action would be improper.

Finney v. Brant, 19 Mo., 43,

Cross v. Williams, 72 Mo., 577,

Taylor v. Coons, (Wis.) 4 N. W., 123.

The contract in this case provides that \$100,000.00 of stock, or that amount if payment be made in money, shall be issued to the parties of the second part (the Consolidated Company's stockholders, plaintiffs herein) "*respectively in the following proportions.*" Does not this clearly indicate, in line with the authorities, an agreement with a number of persons, *but for the benefit of each*? Is the agreement to issue to each *by name a certain specified proportion of the stock*, not exactly the same, as if one person promised in the same writing to pay to each of many persons therein named a particular sum?

But whatever merit that objection might have had has been waived by the answers herein. The alleged defect appeared upon the face of the declarations, and if advantage was to be taken of the point under review, it should have been by demurrer and not otherwise.

XVI.

John C. De La Vergne, one of the original defendants, having died, and having left property in Missouri, the public administrator of the City of St. Louis, under the statutes of Missouri, took charge of De La Vergne's estate and was substituted as a party defendant in the place of the deceased, and the action was revived against him.

Defendant, the De La Vergne Refrigerating Machine Co., claimed that administra-

tion in Missouri was not warranted, De La Vergne having been a resident of New York, and that there should have been no revivor against his administrator. No such objection is made by the estate of the deceased. It might be sufficient to suggest that the De La Vergne Co. cannot raise this question in behalf of the administrator or those whom he represents. The continuance of the proceedings against the administrator cannot be of disadvantage to the De La Vergne Co., and therefore whether the act of the court in reviving the cause against De La Vergne's representative was proper or erroneous, no harm could or can result therefrom to the plaintiff in error.

The facts relating to this matter are that De La Vergne had deposited with one Adolphus Busch, a resident of the City of St. Louis, certain stocks belonging to him, and these certificates were in Busch's hands at the time of De La Vergne's death. It was this property upon which the public administrator was proceeding with ancillary administration. The claim made by the De La Vergne Co.'s counsel was that the certificates were not property in Missouri which could be subjected to administration, and the suggestion was made that if the causes were to be revived at all it should have been by citation upon De La Vergne's executors in New York. We are aware of no method by which foreign executors could have been compelled to appear in the Missouri district, and we submit that no error to the defending corporation was committed by the court's ruling.

In the brief below the suggestion was also made that one of the plaintiffs to this cause, Leo Rassieur, at that time judge of the Probate Court for the City of St. Louis, had *appointed* the public administrator to take charge of this estate with a view to securing his aid in this litigation.

At page 67 of the brief filed in said court counsel say :

"It is submitted that any action by a State court which permits such State court, the judge of which is at the time practicing in the Federal Court in the case in which he is pecuniarily interested, to *appoint* an administrator amenable to him in the State Court for his actions, who shall enter into the judge's litigation, where he is both client and attorney, and *consent* to the rendition of a judgment for over \$126,000.00 against the estate of the deceased person, does not tend to the proper administration of justice."

This court will take judicial notice of the Statutes of Missouri. Those statutes, indeed the record in this case, (printed transcript, p. 52) show that the public administrator in Missouri is *an elective officer*, commissioned by the Governor; with his appointment the plaintiff Rassieur had absolutely nothing to do. The statement so made, that he *appointed* the administrator for the purposes of this case, was wholly unwarranted and uncalled for and we trust will not be repeated here; it was no more unwarranted, however, than the further statement that the administrator was appointed to *consent to a judgment* against the De La Vergne estate. Nothing in the

record bears out either assertion. After De La Vergne's demise, his death having been suggested, the administrator who had taken charge of his estate in the performance of his official duties, entered his appearance in the cause so revived in his name. He adopted the answer which had been filed for De La Vergne, by counsel who made the assertion of which we complain, and he consented to nothing upon the trial. He waived nothing and he admitted nothing, as the records will show.

The De La Vergne Co. also urged against an affirmance of this judgment that the trial court had erred in rendering judgment against the assets of John C. De La Vergne, deceased, in the hands of the Public Administrator of the City of St. Louis, who had taken charge of these Missouri assets. The record will disclose that when this question was raised it was by motion of *the De La Vergne Company* to dismiss as to the defendant administrator, on the ground, as already stated, that at the time of De La Vergne's death he had no property in Missouri subject to administration. And during the trial, when the plaintiffs offered evidence against the administrator, showing his election, qualification, that he had taken charge of De La Vergne's estate, etc., *the De La Vergne Company* again objected on the same grounds.

The administrator did not sue out any writ of error, and the only appealing party and the only complaining party is the De La Vergne Company.

In the Court of Appeals said company, for the first time, raised the objection that the action should not

have been *revived at all* against De La Vergne's representative, but should have been proceeded with against the De La Vergne Company alone. This contention it based upon Sections 955 and 956 of the U. S. Revised Statutes.

In Missouri all actions are revivable in favor of, or against the representatives of a deceased plaintiff or defendant, or the representative of one of several plaintiffs or defendants, wherever the cause of action survives. (*Revised Statutes of Mo.* of 1889, Sec. 2196.)

Gamble v. Daugherty, 71 Mo., 599.

Section 955 above referred to provides that where a plaintiff or defendant dies, the action shall not abate, as at common law, if the right of action survives, but may be proceeded with in favor of or against representatives of the deceased. Evidently having before him the idea that cases might arise where there was *more than one plaintiff or more than one defendant*, and that one party on either side might die, in which event, at common law, the entire action abated, the framer of the act further provided by Section 956, that where one of several plaintiffs or where one of several defendants dies, the action shall not thereby abate, but may be continued in favor of the surviving plaintiffs or against the surviving defendants.

It was claimed by plaintiff in error that under the latter section an action *necessarily* abates as to a dying defendant.

We respectfully submit that taking the two sections together, it is apparent that the purpose of the act was simply to prevent the abatement of the entire action where there are several defendants and one dies, and his legal representatives either decline to come in and be substituted, or where they are, as in the case at bar, beyond the jurisdiction of the court, and cannot be brought in involuntarily.

But, however this may be, the objection not having been made in the trial court, plaintiff in error cannot ask for its consideration.

No authorities need be cited in support of the proposition that a point cannot be pressed for the first time upon the attention of the Appellate Court.

The case of *Insurance Company v. Lewis*, 97 U. S., 682, which was relied upon by plaintiff in error, was a case, where Lewis, as administrator, was plaintiff, endeavoring to enforce by suit a life insurance policy issued by the defendant. As will appear from the opinion in that case, it was *admitted* that the deceased left no property in Missouri, and that Lewis took charge of the administration "*for the sole purpose of collecting the policy in suit.*" Upon the defense that the plaintiff had *no cause of action* it was held by this court that under these admissions judgment could not be sustained in favor of the administrator.

In the case of *New England Life Insurance Company v. Woodworth*, 111 U. S., 138, the action by an administrator on a policy of insurance was upheld, though the place of administration was not the

place of the deceased's residence. The question in that case was also raised on the defendant's appeal, that the plaintiff, as such administrator, had no cause of action.

In the case at bar, De La Vergne's representative did not sue out a writ. Even though he might have raised the question, or even if De La Vergne's New York executors might have appeared specially to raise this objection, we respectfully submit it cannot be raised by the De La Vergne Company.

How is it injured or affected adversely by the action of the lower court in permitting the revivor, or in entering judgment as well against the assets of De La Vergne in Missouri as against the De La Vergne Company?

Counsel recognized the weakness of their position, for they said that it might be claimed that such action was not available error in behalf of the De La Vergne Company. They sought to answer this objection, which naturally occurred to them, by claiming that if the contract sought to be enforced was entered into by De La Vergne *without any authority* from the stockholders or the directors of the company, that there would be a liability, either on the part of De La Vergne or his estate, to the corporation for any injury resulting therefrom, and that therefore "The De La Vergne Company is justifiably interested in having a judgment, if any can be recovered in such form, that it has validity against De La Vergne's estate."

We submit that if the contract was entered into by the deceased party *without authority* (the trial court

expressly found that he acted pursuant to authority, and the agreed statement admits as much), that there never would have been a judgment rendered against the plaintiff in error. Or if the contention be true that De La Vergne acted without authority, the company may still pursue its claim against his estate in New York, Missouri, or elsewhere. So that in no view of the case can it be said that the De La Vergne Company is injured or prejudiced by the judgment against the goods and chattels of De La Vergne in the hands of the Missouri executor. If this judgment is good, then clearly the De La Vergne Company is benefited to that extent. If the judgment is void, as claimed, the De La Vergne Company is in no worse position than if the court below had sustained its motion to dismiss this suit as against the De La Vergne estate. Had the motion been sustained, clearly the suit would have been proceeded with against the De La Vergne Company alone, upon the theory of its counsel, and judgment would have followed against it as a sole defendant.

The claim was also made that inasmuch as the only property which Mr. De La Vergne owned in Missouri, at the time of his death, consisted of stock in a New York corporation, that this was not such property as could be made the subject of administration in St. Louis; this, on the theory that the *situs* of the stock was the home of the corporation issuing it. In support of this contention were cited the cases of *Armour Bros. Packing Co. v. St. Louis National Bank*, 113 Mo., 12, and *Young v. Iron Co.*, 2 S. W. Rep., 202. In each of these cases the

question was whether stock in a foreign corporation could be reached by *levy of an execution* on the mere certificates. It was very properly held that corporate stock could not be so reached by process. But this, we submit, does not in any way determine that the certificate cannot be taken into the custody of an administrator, and either sold or distributed to the proper parties in course of administration. On the contrary, it has been held, as we have already shown, that the assignee of stock from a foreign executor or administrator may compel the transfer thereof in the courts of the State where the corporation is located or does business.

Middlebrook v. Merchants' Bank, 3 Abb.

App. Dec., 295; s. c., 41 Barb, 481.

Luce v. Railroad, 63 N. H., 588.

Brown v. Gas Light Co., 58 Cal., 426.

The mere fact that the *situs* of the stock was with the corporation in New York, and that it could not be seized under execution or levied upon, by garnishment or otherwise, except in that State, did not prevent the title from vesting in a Missouri administrator. As well might it be insisted that the title to a claim of a decedent in Missouri against a debtor residing in New York City would not vest in a Missouri administrator; for the *situs* of the debt in such case is in New York, where the debtor resides.

In the case last supposed, if the debt was evidenced by a written acknowledgment, it could not be levied upon or seized by the manual taking on the part of the officer of the paper itself; yet, no one will suppose that in case of the death of the holder thereof,

the title to the claim would not pass to his legal representative.

If Richardson, the administrator, had been directed by the proper court in which administration was proceeding, to sell the De La Vergne stock to pay debts, the purchaser taking title from him could have compelled the transfer of the stock in New York; or, if the stock were not required for the payment of debts. at the close of administration the distributee from the administrator, could compel such transfer.

Shares of stock in a corporation are deemed personal property. Says *Redfield on Wills*:

"Some of the early English cases treated shares of stock in joint incorporated companies as real estate, on account of the profits arising or accruing out of the realty; but the settled rule, both in England and in America, is that the shares in all corporations, or what is commonly denominated corporate stock, are mere personalty."

3 Redfield on Wills, Star page 182.

Being personalty, the stock therefore passes to the legal representative of the deceased at such place or places where the stock may be at the time of his death.

The point in question is not whether the Missouri administrator could maintain an action in his representative capacity in New York, or whether the stock could have been *levied* on in Missouri, but whether his assignee of this stock could maintain title thereto in the domicile of the corporation.

This precise question is discussed by Judge Story in the case of *Trecothick v. Austin*, 4 Mason's C. C. Rep., 16, in which he says :

"Whenever the title to a thing passes by the *lex loci*, that title may, nay, must be, made out by such law, and that is all that is necessary. The reason why an administrator cannot sue in his own name for property here, is that the administration is local and confers such right only as to the property within the jurisdiction. It is a limited right of representation of the deceased. But suppose a foreign administrator sells goods of the deceased in a foreign country, and they are brought here and the right to them is here contested in a suit, may not the party assert his title to them under the foreign sale and administration, without a probate here? *A will bequeathing personal estate conveys that property wherever it may be situated*, if the will is made according to the laws of the place of the testator's domicile. And it has never been supposed that it was indispensable to the assertion of a title derived under such will, that there should be a probate in every place where such property was situated.

To the same effect are the cases of *Middlebrook v. Merchants' Bank*, 41 Barb., 481, and *Luce v. Railroad Co.*, 63 N. H., 588, already referred to.

We therefore submit that the shares of stock of De La Vergne in the hands of Mr. Busch in St. Louis, at the time of his decease, were assets properly administered upon in Missouri. And this is the only question which was raised by the De La Vergne

Company in the trial court although it is difficult to conceive how that question could concern it.

But recurring again for a moment to the question of the right to revive an action under the federal statute, where one of several parties on either side of a case dies, we call to the court's attention the case of *Martin's admr. v. B. & O. R. Co.*, 151 U. S., 673, and *Moses v. Wooster*, 115 U. S., 285, which appear to recognize that right. In the latter case the court says:

"Undoubtedly cases may arise in which the presence of the representatives of a deceased appellant will be required for the due prosecution of an appeal, *notwithstanding the survivorship of others.* * * * Here, however, there is no need of a revivor that substantial justice may be done. The decree below was against all the defendants jointly, upon a joint cause of action. It affected all alike, and the interest of the decedent is in no way separate or distinct from the others. *If the representatives of a decedent appellant voluntarily come in and ask to be made parties, they may be admitted.* In the present case the representatives of the decedent, although notified, do not appear."

From which it would appear that it is not improper to revive an action against the representatives of a dying party, although other parties are left on the same side of the case.

That counsel were themselves of opinion in the lower court that the action was properly revivable against De La Vergne's representatives, but merely claimed that it was not competent to revive against

the Missouri administrator, is apparent from their suggestion then made that plaintiffs should have brought in the New York executors, in order to obtain what they termed a valid judgment against De La Vergne's estate for the benefit of the De La Vergne Company, if De La Vergne had exceeded his authority in the making of the contract.

It has been repeatedly held that *no judgment shall be reversed in a court of error when it is clear that the error did not prejudice and could not have prejudiced the rights of the party against whom the ruling was made.*"

Smith v. Shoemaker, 17 Wall., 630.

Decatur Bank v. St. Louis Bank, 21 Wall., 294.

Ogdensberg v. Railroad, 22 Wall., 123.

Lancaster v. Collins, 115 U. S., 222.

Therefore, since under no view of this objection, whether the court below was right or erred, the De La Vergne Company was prejudiced or injured, should the cause be reversed.

XVII.

Lastly it was urged, and will be again urged by counsel for the De La Vergne Co., that defendants received nothing of value from plaintiffs, and that plaintiffs are seeking to recover a judgment from them upon a mere barren and technical contract. After what we have said in the course of this argument we feel that such contention need scarcely be further answered, but we cannot refrain from again recalling to the court that the defendants

obtained all the advantages and the benefits of the contract, so far as they made effort to acquire them. And so two courts have determined after painstaking and deliberate investigation.

Defendants understood perfectly that plaintiffs were not themselves to make actual delivery to them of the tangible assets of the Consolidated Company, but that they were to work out their right of possession for themselves and in their own way. The sale was subject to the rights of the Consolidated Company's creditors, and this was so plainly announced by the language of the contract that it is idle for defendants to insist that because they did not get these assets, *free from this burden*, that therefore they received nothing and should pay nothing.

Even though these tangible assets, subject to the rights of the assignee, as the representative of the Consolidated Company's creditors, had been the only thing for which defendants agreed to pay the amount nominated in the contract, and even though they had never received a single article from the hands of the assignee, that would constitute no defense to these actions, if in fact they acquired all that plaintiffs professed to sell; which was the right to secure these assets from the assignee by an appropriate arrangement with creditors. The failure of defendants to exercise that right cannot deprive plaintiffs of the consideration agreed to be paid therefor.

Nor would it avail defendants if they satisfied the court that they had ventured into an unprofitable bargain. They were *sui juris* and what they did

was done after the most careful and businesslike investigation.

But the bargain was not an unprofitable one. The only difficulty, and that is the difficulty which has given rise to this litigation, is that defendants sought to make it still more profitable by evading their obligation to plaintiffs. They have endeavored, as the record discloses, to secure by stealth and under cover, without remuneration to plaintiffs, that which they bargained for and for which they agreed to pay.

They did secure the good-will of the Consolidated Co.; they secured its trade, they secured the covenants of the plaintiffs and they secured legal control over the Consolidated Company's corporate rights by obtaining and retaining the custody of the certificates of stock, all assigned to De La Vergne. These were evidently all of the benefits for which they particularly cared, and having procured them they were willing to forego the possession of the ordinary personal chattels.

Had their repudiation been promptly made, and made before they had secured the substantial benefits of the contract, plaintiffs might have, and could have, found other willing purchasers. But the conduct of defendants prevented this. Plaintiffs had not even in September the evidence of title to their own property.

And having, upon one pretext or another, avoided an open avowal of their position until satisfied that plaintiffs were no longer in position to reorganize

their corporation, or to negotiate with others for a sale of their equity in the assets thereof, and satisfied that they had extracted from those assets the greater value thereof, they have sought, upon every technicality, to evade that compensation which they solemnly promised to make. And they have succeeded for eight long years.

We have thus attempted, at the hazard of being tedious, to anticipate the arguments which were made on behalf of defendants in the courts below. We have no doubt that since the announcement of the judgment of the Court of Appeals counsel will have discovered further technical objections which will be urged upon this court. But confident that none can be advanced with sufficient merit to induce this court to set aside the deliberate judgment of two courts, we submit this cause.

J. M. WILSON,

LEO RASSIEUR,

ELENEIOUS SMITH,

Attorneys for Defendants in Error.

St. Louis, Mo., March 9th, 1899.

DE LA VERGNE REFRIGERATING MACHINE COMPANY *v.* GERMAN SAVINGS INSTITUTION.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 45. Argued April 7, 11, 1899. — Decided November 30, 1899.

Under the laws of the State of New York, providing for the organization of manufacturing corporations, such corporations are not authorized to purchase the stock of a rival corporation, for the purpose of suppressing competition and obtaining the management of such rival.

Unless express permission be given to do so, it is not within the general powers of a corporation to purchase stock of other corporations for the purpose of controlling their management.

Where an action is brought upon a contract by a corporation to purchase such stock for such purpose, it is a good defence that the corporation was prohibited by statute from entering into it; even though the corporation may be compelled, in an action on *quantum meruit*, to respond for the benefit actually received.

THIS was a consolidation of eight actions brought by the German Savings Institution and seven other plaintiffs, in the Circuit Court of the city of St. Louis, against the De la Vergne Refrigerating Company and John C. De la Vergne, its president and principal stockholder, personally, for a failure to deliver to plaintiffs certain stock in the Refrigerating Company.

Certain personal property was seized upon attachment issued, a forthcoming bond given therefor, and the several actions were afterwards removed to the Circuit Court for the Eastern District of Missouri upon the joint petition of the defendants. In that court the several actions were consolidated and sub-

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mitted upon an agreed statement of facts upon which judgment was entered for the defendants.

Pending the proceedings in the state court, and on May 12, 1896, John C. De la Vergne died, and on November 5, 1896, his death was suggested to the court, when William C. Richardson, public administrator of the city of St. Louis, entered his appearance, and with his consent an order was entered reviving each of such actions against him.

From the judgment so entered in the Circuit Court, a writ of error was taken from the Circuit Court of Appeals, the judgment of the court below reversed, and the cause remanded with directions to grant a new trial. 36 U. S. App. 184.

Amended answers were filed in the lower court, much testimony taken, the cause submitted to the court without a jury, and a judgment entered in favor of the plaintiffs for \$126,849.96.

From this judgment a writ of error was prosecuted by the Refrigerating Company, one of the defendants. The judgment was affirmed by the Court of Appeals by an equal division. 49 U. S. App. 777. Whereupon the Refrigerating Company applied for and was allowed a writ of certiorari from this court.

Mr. Frederick W. Lehmann and *Mr. Charles H. Aldrich* for plaintiff in error, petitioner. *Mr. Charles Nagel* was on their brief.

Mr. J. M. Wilson and *Mr. Leo Rassieur* for defendants in error. *Mr. Eleneious Smith* was on their brief.

I. The contract involved in this cause was not *ultra vires* the De la Vergne Company.

(a) The subject-matter of the contract, the thing bargained for and purchased, was not stock of the Consolidated Company, but its tangible assets, its outstanding accounts and its good will, subject to the payments of its debts, and the custody thereof until such payment, by the Illinois assignee. *German Savings Institution v. De la Vergne Refrigerating Machine Co.*, 36 U. S. App. 184; S. C., 70 Fed. Rep. 146.

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(b) But if stock of the Consolidated Company was the subject-matter of the purchase by the De la Vergne Company, the contract was not *ultra vires*, because the laws of the State of New York do not prohibit such purchase, as contended by the De la Vergne Company, but on the contrary permit it. Laws N. Y. 1853, c. 331, § 2. Act of June 4. Rev. Stat. N. Y. 1889, Vol. 3, p. 1961; Laws of 1866, c. 838, §§ 3 and 4; Rev. Stat. N. Y. 1889, Vol. 3, p. 1967.

II. The contract was not *ultra vires* as requiring or obligating the De la Vergne Company to increase its capital stock.

The contract itself recites that the De la Vergne Company was then considering the plan of increasing its stock, and by the contract it was left optional with said company either to make such increase and to pay plaintiffs with such increased issue, or to pay in money.

But even if the contract had required such increase and the De la Vergne Company had no power to contract therefor and for the payment in such form, it will nevertheless be compelled to make compensation in some other form; in money. *Hitchcock v. Galveston*, 96 U. S. 341; *Fort Worth City Co. v. Smith Bridge Co.*, 151 U. S. 294; *State Board of Agriculture v. Citizens' Street Railway*, 47 Indiana, 407; *Morawetz on Corporations*, § 86; *Missouri Pacific Railway v. Sidell*, 35 U. S. App. 152; *Bensiek v. Thomas*, 27 U. S. App. 765.

III. The contract was not *ultra vires* the Consolidated Company because it was not a mere combination or coalition for the purpose of creating a monopoly or trust; but was a legitimate business undertaking. *Morawetz*, § 212; *Herriman v. Menzies*, 115 California, 16; *Allegheny River Oil Creek Co. v. Pennsylvania Trans. Co.*, 83 Penn. St. 160; *Whitney Arms Co. v. Barlow*, 63 N. Y. 62; *Gasquet v. Crescent City Brg. Co.*, 49 Fed. Rep. 496; *Camden and Atlantic City Railroad v. May's Landing and Egg Harbor Railroad*, 48 N. J. Law, 567.

IV. The De la Vergne Company's execution of the contract is fully established.

(a) The answers denying its executions are not verified, and thereby the execution stands admitted. Rev. Stat. Mo. 1889, sec. 2186.

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(b) And such admission, by failure to verify, is not merely with reference to the formal or clerical execution, but includes the admission of substantial execution. *Rothschild v. Frensdorf*, 21 Missouri App. 318; *Smith Purifier Co. v. Rembaugh*, 21 Missouri App. 390; *Beck & Pauli Lithographing Co. v. Obert*, 54 Missouri App. 240, 246.

(c) The testimony furnished by defendants themselves establishes a ratification of the contract by the De la Vergne Company, even if the president had no original authority to execute it. The corporation paid the services and expenses of the experts employed to investigate the affairs of the Consolidated Company; the directors were acquainted with the execution of the contract and the disbursement of these moneys and made no objection thereto; the by-law of the defendant corporation gives the president unlimited powers to enter into contracts on its behalf; within five days after the contract was executed the defendant company employed the Consolidated Company's former salesman, took charge of its former New York branch office and entered upon the business of selling machines built upon the Consolidated type or pattern.

(d) The agreed statement of facts *admits* the execution of the contract by both De la Vergne and the De la Vergne Company.

V. Where a contract admits of two constructions, one of which results in its validity and the other in its illegality, the former will be adopted. *Shore v. Wilson*, 9 Clark & F. 355; *Noonan v. Bradley*, 9 Wall. 394, 407; *Ormes v. Dauchy*, 82 N. Y. 443; *Curtis v. Gokey*, 68 N. Y. 300; *Sheffield v. Balmer*, 52 Missouri, 474; *Crittenden v. French*, 21 Illinois, 598; 2 Parsons on Contracts, (8th ed.) 168; Jones on Construction of Contracts, §§ 223, 224.

VI. Jungenfeld's executors had power to assign the stock of that estate without an order of court. At common law the legal title to the personalty of the deceased passes to his executor or administrator, who has absolute control and dominion over the same, with power of alienation; and the conveyance of the executor or administrator passes good title to the vendee or assignee. Williams on Executors, (ed. 1859)

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p. 269; Woerner on American Law of Administration, sec. 331; 3 Wait's Act. & Def., 244, and cases cited; *Downing v. Garner*, 1 Missouri, 751; (reprint 537); *Makepeace v. Moore*, 10 Illinois, (5 Gilm.) 474; *McConnell v. Hodson*, 7 Illinois, (2 Gilm.) 640; *Walker v. Craig*, 18 Illinois, 116; *Thornton v. Mehring*, 117 Illinois, 55.

In those States where administration acts have been adopted the rule is that an executor or administrator selling personally without the sanction of the court possessing probate jurisdiction, makes himself answerable for the full value of the property; but his sale is not void — on the contrary his *bona fide* vendee obtains good title. Administration acts are in aid, not in exclusion, of the common law powers of the legal representative. Schouler's Executors & Administrators, (2d ed.) § 346; Smith's Probate Law, (Mass.) 111; *Harth v. Heddlestone*, 2 Bay's Rep. (S. C.) 321; *Mead v. Byington*, 10 Vermont, 116; *Sherman v. Willett*, 42 N. Y. 146; *Dickson v. Crawley*, 112 N. C. 629; *Minuse v. Cox*, 5 Johns. Ch. 441; *Wynns v. Alexander*, 2 Dev. and B. Eq. Rep. 58.

An exception to this rule seems to exist in Missouri with respect to bonds and promissory notes. The cases of *Stagg v. Green*, 47 Missouri, 500; *Stagg v. Linnenfelser*, 50 Missouri, 336; *Chandler v. Stevenson*, 68 Missouri, 450; *Weil v. Jones*, 70 Missouri, 560, merely go to this effect and no further.

State to use of Wolff v. Berning, 74 Missouri, 87, merely holds that an administrator, *de bonis non*, may reclaim notes pledged by his predecessor, for his own purposes, with one having notice of that fact and of their true ownership.

These were the cases relied on in the lower court by defendants.

The Missouri administration act provides that executors or administrators may make compromises with and execute releases to debtors of the estate, upon orders from the probate court. Yet it has been held that a release without such direction or sanction will be good, the executor being personally liable for any loss caused by his lack of due care or prudence. *Mosman v. Bender*, 80 Missouri, 579; *Jacobs v. Jacobs*, 99 Missouri, 427.

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And to this same effect, this court in *Maclay v. Equit. Life Ass. Soc.*, 152 U. S. 499.

VII. The will of Jungenfeld in express terms authorized his executors "to sell, convey and transfer any part or portion of my estate if they deem it for the advantage of those interested as legatees." Their assignment to defendants was therefore effectual, both under the will and by reason of their general legal power.

VIII. Executors may convey title to shares in a corporation organized under the laws of a foreign jurisdiction. "The assignee of stock assigned by a foreign executor may compel the transfer thereof in the courts of the State where the corporation does business." *Middlebrook v. Merchant's Bank of New York*, 3 Abb. App. Dec. 295; *Same Case on Appeal*, 41 Barb. 481; *Luce v. Manchester & Lawrence Railroad*, 63 N. H. 588; *Brown v. San Francisco Gas Light Co.*, 58 California, 426; *Trecothick v. Austin*, 4 Mason's C. C. Rep. 16.

IX. The trustees of Jungenfeld's minor son also had power to assign and transfer the minor's stock to defendants. The will gave them general power to "manage, control and invest," and it was manifestly the intention of the testator to confer upon them the power of sale. Such power need not be granted by express words, but may be inferred where the intention is apparent. 18 Am. & Eng. Enc., "Powers," 901 and cases collected; *Danish v. Disbrow*, 51 Texas, 235; *Orr v. O'Brien*, 55 Texas, 149.

X. There is no presumption of law that one acting in a trust capacity has the right to sell. Persons dealing with a trustee are put on inquiry and are bound to ascertain for themselves the extent of his power, and what title, if any, they will obtain by the trustee's conveyance. *German Savings Institution v. De la Vergne Machine Co.*, 36 U. S. App. 184; *Duncan v. Jaudon*, 15 Wall. 165; *Mason v. Wait*, 5 Illinois, 127, 135; *Brewer v. Christian*, 9 Illinois App. 57; *Harmon v. Smith*, 38 Fed. Rep. 482; *Shaw v. Spencer*, 100 Mass. 382; *Wood's Appeal*, 92 Penn. St. 379.

XI. An agreement to transfer or assign stock is sufficiently performed by a delivery or an offer of certificates therefor

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assigned in blank ; *Keller v. Eureka Brick Machine Mfg. Co.*, 43 Missouri App. 84.

XII. The suggestion made below by defendants that because the Consolidated Company had assigned all of its property for the benefit of its creditors, and that therefore neither it nor its stockholders possessed any right which could be conveyed by the agreement of April 16, 1891, is without merit.

Under the Illinois assignment laws a right of reconveyance from the assignee existed on an adjustment with a majority in number and amount of the creditors ; and it was this right or equity which defendants purchased and the agreement expressly so recites. In addition thereto defendants also secured the good will and trade of the Consolidated Company and the express covenant of its stockholders, plaintiffs herein. Defendants got all for which they bargained.

XIII. The special finding of facts made by the court below is conclusive on appeal as to the matters found. *Stanley v. Albany County*, 121 U. S. 535 ; *Allen v. St. Louis Bk.*, 120 U. S. 20 ; *Republican River Bridge Co. v. Kansas Pacific Railroad*, 92 U. S. 315.

Where a cause is tried upon waiver of jury and the court makes a special finding of the facts, the only question upon the writ of error is the sufficiency of the facts found to support the judgment. The appellate court will not inquire whether the evidence was sufficient to support the findings.

Nor is error in the findings of fact subject to revision, if there was *any* evidence upon which the findings could be made. *Hathaway v. Bank of Cambridge*, 134 U. S. 494. And special findings of facts by the court need only state the *ultimate facts*, not the evidence. *Union Silver Mining Co. v. Taylor*, 100 U. S. 37.

And a refusal of the trial court to find incidental facts, amounting only to evidence bearing upon the ultimate facts to be found, is not a proper subject of review. *Hathaway v. Bank of Cambridge*, 134 U. S. 494.

XIV. The refusal of the trial court where a jury has been waived to give abstract declarations of law, is not error.

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Mercantile Mutual Insurance Company v. Folsom, 18 Wall. 237.

XV. The contract in question, providing as it did for a distribution of \$100,000 to the various plaintiffs, in the proportion in which they held stock in the Consolidated Company, amounted to a promise to each; and each was therefore warranted in bringing a separate action for the proportionate amount due him. A general action would have been improper. Bliss on Code Pleadings, § 3; *Taylor v. Coon*, 48 N. W. Rep. 123; *Finney v. Brant*, 19 Missouri, 42; *Cross v. Williams*, 72 Missouri, 577.

XVI. Neither party to a contract can rescind without placing the other in *statu quo*; nor when sued for the purchase price successfully defend while retaining its benefits. *Ger. Savings Institution v. De la Vergne Ref. Mach. Co.*, 36 U. S. App. 184, and cases there cited; Story on Sales, § 427; Bigelow on Estoppel, (5th ed.) 552; 3 Wait's Act. & Def., 483; *Mansfield v. Trigg*, 113 Mass. 350; *Miller v. Tiffany*, 1 Wall. 298; *Andrews v. Hensler*, 6. Wall. 254; *Reeves v. Corning*, 51 Fed. Rep. 774; *Union Nat. Bank v. Matthews*, 98 U. S. 621; *Washburn Mill Co. v. Bartlett*, 54 N. W. Rep. 544.

XVII. De la Vergne having entered his general appearance in these causes in his lifetime, upon his death the suits were lawfully revived against the administrator of his estate in Missouri. Sects. 955 and 956, Rev. Stat. U. S.; sec. 2196, Rev. Stat. Missouri, 1889, ch. 33, art. 8; sec. 1995, Rev. Stat. Missouri, 1889, ch. 33, art. 1; *Gamble v. Daugherty*, 71 Missouri, 599.

If error was committed in entering judgment *de bonis testatoris* against De la Vergne's administrator, he having failed to appeal or sue out a writ of error, plaintiff in error, De la Vergne Company, cannot avail itself of such error against its co-defendant, nor can such judgment preclude any rights which the defendant company may have against De la Vergne's estate. They are not adversary parties in the pending suits. *McMahan v. Geiger*, 73 Missouri, 145; *State Bank of St. Louis v. Bartle*, 114 Missouri, 276; *Price v. Lederer*, 33 Missouri App. 426; Vol. 12, Am. and English Enc., p. 83; Century

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Digest, § 3584, § 3589, Infants; § 3590, Principals and Sureties.

MR. JUSTICE BROWN, after stating the case as above, delivered the opinion of the court.

The principal question in this case is whether, under the laws of New York providing for the organization of manufacturing corporations, such corporations are authorized to purchase the stock of a rival corporation for the purpose of suppressing competition and obtaining the management of such corporation.

The facts of the case are substantially as follows: The Consolidated Ice Machine Company (hereinafter referred to as the Consolidated Company) was a corporation organized under the laws of Illinois, and was engaged in the business of manufacturing and selling refrigerating and ice-making machines. The entire amount of issued stock of such corporation was \$100,000, held in various proportions by the plaintiffs in this consolidated cause. Having become insolvent, the company, on October 14, 1890, made an assignment under the general laws of Illinois, for the benefit of creditors, to one Jenkins, who, at the date of the contract sued upon, was engaged in winding up its business. The assignment on its face purported to convey to Jenkins and his successors in trust the entire real and personal "property and effects of every kind and description" belonging to the corporation, "or in which it has any right or interest," the same being fully and particularly enumerated and described in an inventory, which, however, does not appear in the record. Its assets consisted mainly of a plant for the manufacture of refrigerating and ice-making machines in Chicago; of patent rights, outstanding accounts, and the good will of its business, which appears to have been an extensive one.

It is asserted by the plaintiffs, who are stockholders in this company, that the assets exceeded in value the liabilities of the company, and that the company was not in reality insolvent, but had assumed contracts to such an extent that, with its limited capital, it was unable to carry them out.

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However this may be, subsequently to the assignment, and on April 16, 1891, the company itself, by its president as party of the first part, and its stockholders as parties of the second part, entered into an agreement with the De la Vergne Refrigerating Machine Company, a corporation organized under the laws of New York, (hereinafter called the Refrigerating Company,) as party of the third part, and John C. De la Vergne, of the State of New York, president of that company, as party of the fourth part. This agreement is the basis of the action. After reciting that the Refrigerating Company was willing to acquire such right as the Consolidated Company and its stockholders could assign in and to the assets of such company; that under the laws of Illinois the Consolidated Company was not entitled to the possession of its assets in the hands of the assignee until its obligations had been discharged; that the Refrigerating Company was incorporated with a stock of \$350,000 when its assets were worth \$1,400,000; and that its stockholders were considering a plan of increasing the stock to \$2,000,000, of which \$1,000,000 was to be turned over to the Consolidated Company under the terms of the agreement:

Therefore, in view of these facts, the Consolidated Company and its stockholders covenanted with the Refrigerating Company and its president, De la Vergne, to sell and convey unto the Refrigerating Company all their right, title and interest in and to the assets of the party of the first part, subject to the payment of its obligations, and subject to the custody thereof in the legal custodian, R. E. Jenkins, assignee as aforesaid.

The second clause contained a covenant to issue to the stockholders of the Consolidated Company fully paid up stock in the Refrigerating Company to the amount of \$100,000 in certain specified proportions to each stockholder.

By the fourth clause, the stockholders agreed within ten days from the date of the agreement to assign to De la Vergne, for the benefit of the Refrigerating Company, all stock of the insolvent company which had been issued, and which they guaranteed had been paid in full; and within sixty days thereafter the Refrigerating Company and its president

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agreed to issue and deliver to the stockholders of the Consolidated Company stock in the Refrigerating Company to the amount of \$100,000.

By the fifth clause, the stockholders in the Consolidated Company covenanted to accept in lieu of the stock of the Refrigerating Company, \$100,000 in cash, at the option of De la Vergne, the president of the company.

By the seventh clause, the stockholders of the Consolidated Company agreed that for a period of ten years they would not enter into or become engaged in the selling or making of refrigerators or ice machines, directly or indirectly, within the United States, excepting the State of Montana.

Within the ten days provided by the agreement, certificates representing one thousand shares of the stock of the Consolidated Company, with written assignments executed by the parties who held the certificates, were delivered to De la Vergne, although ninety-five of these shares were held by P. J. Lingensfelder and Leo Rassieur as executors, and ninety were held by them as trustees under the will of one Jungensfeld, deceased. These shares were assigned by the parties without an order authorizing them to do so from the probate court of St. Louis, in the State of Missouri, in which the estate of Jungensfeld was in the process of administration. Two days after the receipt of these certificates De la Vergne's attorney wrote to Mr. Rassieur, calling his attention to certain technical defects, which were immediately remedied by suitable instruments of further assurance. No objection was then made that the assignments of the executors and trustees were insufficient for want of an order of the probate court authorizing the same.

In the following July demands were several times made by Mr. Rassieur for himself and his associates for the \$100,000 in stock or money stipulated by the contract, but no response was received until September, when Mr. Fitch, acting for the Refrigerating Company, announced for the first time that the defendants declined to carry out their part of the contract. The reasons for the refusal do not seem to have been substantial ones. The letter contained an announcement that Mr.

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De la Vergne's counsel was ready to return the papers sent to him to whomsoever was legally entitled to their custody. There was no reconveyance to the Consolidated Company of whatever was covered by the contract, the covenant of its stockholders to refrain from transacting business for ten years was never released, and none of the certificates and assignments of stock were ever delivered back. It appeared, however, that in the meantime the Refrigerating Company had secured the former New York office of the Consolidated Company; had employed its agents in making contracts with former customers of that company, which contracts were taken in the name of such agent. He was, however, furnished with the means by which they were carried out, and assignments were taken from him, which practically secured the good will of the company, although the Chicago assets were allowed to go to sale by the assignee. At this sale Mr. De la Vergne was present and offered for the tangible assets the sum of \$25,000.

In their answer as amended, defendants set up as justification for a refusal to perform the contract that no assets of the Consolidated Company ever came into the possession of the defendants, since all, including the good will, had been transferred to Jenkins, the assignee, for the benefit of its creditors, and remained in his possession and control until they were disposed of under the direction of the probate court for the benefit of creditors, and that they were insufficient to discharge the liabilities; that the contract sued upon purporting to be executed on behalf of the Refrigerating Company by De la Vergne, its president, was executed without authority; that no benefit of any kind ever accrued to the company under the contract; that the company never received any of the consideration moving to it under the contract; that it never received any of the assets of the Consolidated Company, nor any of the stock; that it never in any manner ratified or approved the contract, but on the contrary rejected the same, and that the plaintiffs well knew at the time of making the contract that De la Vergne had no power or authority to bind the Refrigerating Company; that the defendants notified the plaintiffs that they would not be bound by the contract, and

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that such rejection of the contract was acquiesced in by the plaintiffs, and that relying upon such acquiescence the defendants abandoned all interest in the Consolidated Company; that the contract was in reality for the stock of the Consolidated Company, and that the Refrigerating Company was not authorized by its charter, by the laws of New York or of Illinois, to purchase such stock, and that the agreement was *ultra vires*; and further, that the Refrigerating Company had no authority to stipulate for an increase in its capital stock, as was attempted under the contract, and that the contract was against public policy and wholly void.

1. The main defence pressed upon our consideration is one which does not seem to have been called to the attention of the Circuit Court, and one upon which the Judges of the Circuit Court of Appeals were equally divided in opinion. It is that the president of the Refrigerating Company had no authority to sign the contract in question, and that the agreement itself was *ultra vires* the corporation.

As the general assignment to Jenkins, executed October 14, 1890, was most sweeping in its terms, and included all the real and personal property and effects of every kind and description belonging to the corporation, or in which it had any right or interest, it was doubtless sufficient to pass the good will of the business, which was an incident either to the premises, to the name of the corporation or to the tangible property with which the business was carried on. *Churton v. Douglas*, 1 Johns. (Eng.) Chancery, 174, 188; *Menendez v. Holt*, 128 U. S. 514; *Metropolitan Bank v. St. Louis Dispatch Co.*, 149 U. S. 436; *Willett v. Blanford*, 1 Hare, 253; *Wedderburn v. Wedderburn*, 22 Beavan, 84; *Bradbury v. Dickens*, 27 Beavan, 53; *Williams v. Wilson*, 4 Sand. Ch. 379; *Sheppard v. Boggs*, 9 Nebraska, 257; *Wallingford v. Burr*, 17 Nebraska, 137.

This was evidently the view taken by the assignee, since he subsequently advertised the good will of the business for sale, and sold the same under an order of the court to Clarence A. Knight and Otto C. Butz, who afterward sold the same, including certain of the assets, to John Featherstone's Sons.

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It is difficult, even if the contract were legally executed, to see what assets of value belonging to the Consolidated Company passed to the Refrigerating Company under it, except perhaps the possibility that the assets would prove more than sufficient to pay the debts; or, that a settlement might be effected with a majority in number and amount of the creditors, when, under the laws of Illinois, the assignor would be entitled to a reconveyance and redelivery of the assigned assets. In such case the good will would doubtless return with the other assets to the assignor, *i.e.* the corporation, but not to the stockholders, and the right to sue for a breach of the contract would belong to the corporation, or its assignee. There was also a covenant that the Consolidated Company would not engage in a similar business within ten years from the date of the contract. The Refrigerating Company, however, did not avail itself of this opportunity to compromise with the creditors of the Consolidated Company, but allowed the assignee to dispose of the assets, which, on a forced sale, lacked \$150,000 of being sufficient to pay the debts of the Consolidated Company.

In addition to this, however, there was no corporate action taken authorizing any such conveyance by the corporation, and such conveyance would not, under the laws of Illinois which conform in this particular to the general law, be within the power of the stockholders, even though they all signed it, without formal action at a meeting held for that purpose. *Sellers v. Greer*, 172 Illinois, 549; *Hopkins v. Roseclare Lead Co.*, 72 Illinois, 373; *Humphreys v. McKissock*, 140 U. S. 304, 312; *Allemon v. Simmons*, 124 Indiana, 199; *Smith v. Hurd*, 12 Metc. (Mass.) 371, 385; *England v. Dearborn*, 141 Mass. 590; *Cook on Stockholders*, § 709.

It is true that the president of the Consolidated Company assumed to sign the contract as president, and to bind the company, but it is scarcely necessary to say that the president of a corporation has no power as such to make a general conveyance of the assets of the corporation without at least the assent of the board of directors. *England v. Dearborn*, 141 Mass. 590; *Titus v. Cairo & Fulton Railroad*, 37 N. J. Law,

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98, 102; *McCullough v. Moss*, 5 Denio, 567; *Fulton Bank v. New York &c. Canal Co.*, 4 Paige, 127, 134; *Walworth County Bank v. Farmers' Loan & Trust Co.*, 14 Wisconsin, 325; *Stokes v. N. J. Pottery Co.*, 46 N. J. Law, 237; *Morawetz on Corp.* § 537; 4 *Thomp. on Corp.* § 4622.

The stockholders not only assumed to convey the property of the corporation without title thereto as well as without the requisite authority so to do, but, acting as individuals, they sold "all their right, title and interest in and to the assets" of the corporation, "subject to the payment of its obligations, and subject to the custody thereof in the legal custodian, R. E. Jenkins, assignee as aforesaid." As this transfer was no broader in its terms than those employed in the assignment by the company to Jenkins, and as the stockholders in any event would not have the power to transfer the assets of the corporation, this sale could operate only upon their stock; and that this was the intention is evident from the fourth clause of the contract, by which the stockholders agreed, within ten days from the date of the contract, to assign to De la Vergne all the stock of the Consolidated Company which had been issued, and which they guaranteed had been paid in full, and also by the fact that the certificates for such stock were all assigned by the holders and forwarded to De la Vergne. But again, it is difficult to see what the Refrigerating Company gained by this transfer of stock. Doubtless it gave them the control of the Consolidated Company, but as that company had assigned everything to Jenkins, including the good will, there was nothing left of value in the ownership of the stock. Apparently it could only operate upon the possibility that, by some favorable turn of fortune, the assets might prove more than sufficient to pay the debts, and thus the stock would become of some real value. However this may be, it is quite evident that one of the main objects of the transfer was to get possession of the stock and the right to use the name of the Consolidated Company, assuming that this did not pass to the assignee as part of the good will of the business.

But as the powers of corporations, created by legislative act, are limited to such as the act expressly confers, and the

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enumeration of these implies the exclusion of all others, it follows that, unless express permission be given to do so, it is not within the general powers of a corporation to purchase the stock of other corporations for the purpose of controlling their management. *First National Bank v. National Exchange Bank*, 92 U. S. 122, 128; *Sumner v. Marcy*, 3 Wood & Minot, 105; Morawetz on Corp. sec. 431; 1 Thompson on Corp. § 1102; *People v. Chicago Gas Trust Co.*, 130 Illinois, 268; *Milbank v. New York, Lake Erie & Western Railroad*, 64 How. Pr. 20; *Mechanics' &c. Bank v. Meriden Co.*, 24 Connecticut, 159.

Not only is this true as a general rule, but by the law of the State of New York, under which this corporation was organized, *i.e.* "An act to authorize the formation of corporations for manufacturing, mining, mechanical and chemical purposes," passed February 17, 1848, it was declared in section eight that "it shall not be lawful for such company to use any of their funds for the purchase of any stock in any other corporation." This language is clear and explicit, and evidently covers purchases of stock in other corporations, whether engaged in the same or different business.

In this connection, however, our attention is called to an act passed by the legislature of New York, June 7, 1853, (chapter 333,) amendatory of the act of 1848, the second section of which enacts that "the trustees of such company may purchase mines, manufactories and other property necessary for their business, and issue stock to the amount of the value thereof in payment therefore." The position of the plaintiffs in this connection is that, under the authority to purchase "other property necessary for their business," it was competent for manufacturing corporations to purchase the stock of other similar corporations. But we do not so read the act. Its evident object was to permit manufacturing corporations to purchase mines from which they could extract their own ore, or manufactories of raw material, such as pig iron or lumber, which could furnish to them material to be worked up into their own products; and in case such purchases involved a larger outlay than their present resources would

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justify, to issue new stock "to the amount of the value thereof in payment therefor." But there is nothing to indicate that the legislature intended to authorize them to purchase the stock of competing corporations, or corporations engaged in other business. It is only property necessary for their own current business they were authorized to purchase.

Another act amending the general corporation act of 1848, passed April 28, 1866, (chapter 838,) was intended for a similar purpose. By section three it was enacted that "It shall be lawful for any manufacturing company heretofore or hereafter organized under the provisions of this act or the act hereby amended, to hold stock in the capital of any corporation engaged in the business of mining, manufacturing or transporting such materials as are required in the prosecution of the business of such company, so long as they shall furnish or transport such materials for the use of such company, and for two years thereafter and no longer; and the trustees of such company shall have the same power with respect to the purchase of such stock and issuing stock therefor as are now given by law with respect to the purchase of mines, manufacturing and other property necessary to the business of manufacturing companies. But the capital stock of such company shall not be increased without the consent of the owners of two thirds of the stock, to be obtained as provided by sections twenty-one and twenty-two of the act hereby amended."

The object of this act was evidently much the same as that of the prior act of 1853, that is, to enable manufacturing corporations to produce their own ore and manufacture their own raw materials. To meet the exigencies of this statute it is necessary that the company, whose stock is purchased, should at the time of the purchase be engaged in the business of mining, manufacturing or transporting such materials as are required in the prosecution of the business of the purchasing company; and the right is limited to such time as they shall furnish or transport such materials for the use of such company, and for two years thereafter. It clearly has no application to a case where a manufacturing company pur-

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chases the stock of an insolvent rival concern which has ceased to do business, and whose stock is bought for the evident purpose of preventing a reorganization, and of obtaining its patronage.

In the Revised Statutes of New York of 1889, c. 18, vol. 3, p. 1959, there is also an act, to which our attention is called by a supplemental brief, permitting manufacturing companies to increase or diminish their capital stock to any amount which may be sufficient and proper for the purposes of the corporation, and also to extend their business to any other manufacturing business subject to the provisions of the act.

That neither of these acts were intended to give authority to corporations to purchase stock of other corporations engaged in the same business is evident from a subsequent act approved June 7, 1890, to take effect May 1, 1891, the fortieth section of which provides that ". . . no corporation shall use any of its funds in the purchase of any stock of its own or any other corporation, unless the same shall have been *bona fide* pledged, hypothecated or transferred to it, by way of security for, or in satisfaction or part satisfaction of, a debt previously contracted in the course of its business, or shall be purchased by it at sales upon judgments, orders or decrees which shall be obtained for such debts or in the prosecution thereof. Any domestic corporation transacting business in this State, and also in other States or foreign countries, may invest its funds in the stocks, bonds or securities of other corporations owning lands in this State or other States, if dividends have been paid on such stocks continuously for three years immediately before such loans are made, or if the interest on such bonds or securities is not in default, and such stock, bonds and securities shall be continuously of a market value twenty per cent greater than the amount loaned or continued thereon."

Had the former acts given the unlimited authority to purchase insisted upon by the plaintiffs, this act would have been entirely unnecessary, and instead of enlarging the power previously possessed, would have operated as a restriction upon it. That this act of 1890 does not assist the plaintiffs is evident not only from the fact that the act did not take effect

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until after the contract was made, but from the further fact that it merely authorizes corporations to *invest their funds* in the stocks, bonds or securities of other corporations if dividends have been paid for three years before the loans are made; or if the interest on their securities is not in default, and such securities are worth twenty per cent greater than the amount loaned thereon. This act evidently refers to loans and not to purchases, since the section expressly provides that no corporation shall use its funds in the purchase of any stock, either of its own or any other corporation, unless by way of security for antecedent debts.

The truth is, that the legislature of New York, instead of repealing the prohibitory clause in the original act of 1848, concerning the purchase of stock in other corporations, has modified it but slightly, by slow degrees, and in special cases, to enable a manufacturing corporation to control more perfectly its own legitimate business operations, and has thereby manifested the more clearly its intention to preserve the original inhibition.

Our conclusion upon this branch of the case is that, as the main, if not the sole, object of the purchase from the plaintiffs was to acquire their stock in the Consolidated Company, such purchase was *ultra vires* the Refrigerating Company.

2. Is this defence available to the Refrigerating Company? Whatever doubts might have been once entertained as to the power of corporations to set up the defence of *ultra vires* to defeat a recovery upon an executed contract, the rule is now well settled, at least in this court, that where the action is brought upon the illegal contract, it is a good defence that the corporation was prohibited by statute from entering into such contract, although in an action upon a *quantum meruit* it may be compelled to respond for the benefit actually received.

The earliest case in which this doctrine is distinctly laid down is that of *Pearce v. Madison & Indianapolis Railroad*, 21 How. 441, in which it appears that two railroad companies, which had been consolidated, gave their promissory notes in payment for a steamboat to run in connection with the railroads. It was held that as there was no authority in the

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railroad companies to engage in running steamboats, there could be no recovery on the notes, and that as the plaintiff was not the owner of the boat and had sued upon the notes as an indorsee, there could be no recovery. The same doctrine has been applied to leases *ultra vires* a corporation, and it has been uniformly held that there could be no recovery upon the lease itself, though there might be in an action for use and occupation of the property. *Pittsburgh, Cincinnati &c. Railway v. Keokuk & Hamilton Bridge Co.*, 131 U. S. 371, 384; *Central Transportation Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 48; *S. C.*, 171 U. S. 138; *McCormick v. Market Bank*, 165 U. S. 538, 550; *Thomas v. Railroad Co.*, 101 U. S. 71; *California Bank v. Kennedy*, 167 U. S. 362; *Marble Co. v. Harvey*, 92 Tennessee, 116; *Union Pacific Railway v. Chicago, Rock Island and Pacific Railway Co.*, 163 U. S. 564.

The doctrine that no recovery can be had upon the contract is based upon the theory that it is for the interest of the public that corporations should not transcend the limits of their charters; that the property of stockholders should not be put to the risk of engagements which they did not undertake; that if the contract be prohibited by statute every one dealing with the corporation is bound to take notice of the restrictions in its charter, whether such charter be a private act or a general law under which corporations of this class are organized. *Zabriskie v. Cleveland, Columbus &c. Railroad*, 23 How. 381, 398; *Thomas v. Railroad Co.*, 101 U. S. 71; *Pennsylvania Co. v. St. Louis, Alton & Terre Haute Railroad*, 118 U. S. 290, 630; *Oregon Railway Co. v. Oregonian Railway Co.*, 130 U. S. 1, 25; *Railway Companies v. Keokuk Bridge Co.*, 131 U. S. 371, 384.

As the action in this case is upon the contract, and as the contract was prohibited by the charter of the Refrigerating Company, there can be no recovery upon it.

The difficulty with the position of the plaintiffs in this case is this: If the purchase of the stock was the main object of the contract the consideration was an illegal one, and the promise of the Refrigerating Company to furnish its own

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stock in payment was *ultra vires*. If, upon the other hand, the object of the contract was to obtain the assets and good will of the Consolidated Company upon payment of its debts, then the promise of the Refrigerating Company to pay the plaintiffs therefor was without consideration, since the assets were the property of the Consolidated Company and not of its stockholders, and anything realized by the sale of such assets belonged to the company or its assignee, and should be devoted first to the payment of its debts. If there were anything of value beyond the control of the stock which passed to the Refrigerating Company under the contract, the assignee could not be dispossessed of it until all the debts were paid or compromised, when it would revert to the corporation but not to the plaintiffs. Their title to sue must rest upon their ownership of the stock, and if the defence of *ultra vires* be sustained, we know of no theory upon which the plaintiffs can recover. It certainly cannot be true that the plaintiffs can take to themselves the hundred thousand dollars stipulated by this contract and leave creditors of the corporation unpaid to the extent of \$150,000.

The judgment of the Circuit Court of Appeals and of the Circuit Court must therefore be reversed, and the case remanded to the Circuit Court for the Eastern District of Missouri with directions to grant a new trial.

MR. JUSTICE BREWER and MR. JUSTICE McKENNA dissented.